TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1282.

THE CENTRAL TRUST COMPANY OF NEW YORK,
APPELLANT,

vs.

R. S. GRANT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED OCTOBER 2, 1889.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, FEBRUARY 6, 1890.

1 At a stated term of the circuit court of the United States of America within and for the western division of the southern district of Ohio, in the sixth judicial circuit of the United States of America, begun and had in the court-rooms, at the city of Cincinnati, O., in said district, on the first Tuesday of October, being also the second day of that month, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States of America the one hundred and thirteenth—present, the Honorable Howell E. Jackson, circuit judge, and the Honorable George R. Sage, district judge—among the proceedings had were the following, to wit:

THE CENTRAL TRUST COMPANY, a Corporation, Complainant, *vs.* R. S. GRANT, Defendant.	In Chancery. # 4217.

Be it remembered that heretofore, to wit, on the 28 day of January, in the year of our Lord one thousand eight hundred and eighty-nine, came the complainant, The Central Trust Co., by its solicitors, and filed in the clerk's office of said court their certain bill of review. Said bill of review is clothed in the words and figures following, to wit:

2 Compared. Filed Jan. 28, '89.

Circuit Court of the United States, Southern District of Ohio, Western Division.

THE CENTRAL TRUST COMPANY, a Corporation, Complainant, *vs.* R. S. GRANT.	In Chancery. # 4217.

To the judges of the circuit court of the United States in the sixth circuit, southern district of Ohio, western division:

Humbly complaining, showeth unto your honors the Central Trust Company, a corporation under the laws of the State of New York, which brings this its bill of review and says—

That on the — day of August, 1883, your orator filed its bill of complaint in this court in case # 3554, wherein it was complainant and The Toledo, Cincinnati and St. Louis Railroad Company, The Cincinnati Northern Railway Company, The Spring Grove, Avondale and Cincinnati Railway Company, and Granville D. Braman were defendants, praying for the foreclosure of a certain first mortgage made by said Cincinnati Northern R'y Co. upon said Cincinnati Northern railway, extending from Cincinnati, Ohio, to
3 Dodds, in Warren county, Ohio, which said railway in the subsequent proceedings in said case # 3554 is known as the Cincinnati Northern railway; which said bill prayed for the sale of

said railway and property to satisfy certain bonds and interest thereon secured by said mortgage, and for the appointment of a receiver, as will more fully appear by the said bill of complaint, which is hereby referred to, a copy of which is marked "Exhibit 1" and filed herewith.

2. That on the 20th day of October, 1883, one William J. Craig was by an entry made in said case # 3554 appointed receiver of the railway and property described in said bill of complaint and in paragraph one thereof, and at said date said Craig took possession of said railway and proceeded to operate the same under the direction of said court. A copy of said order so appointing said Craig receiver is hereto attached (and reference to the same is hereby made), marked "Exhibit 2."

Your orator further says that similar bills of complaint were filed by it in this court October 20, 1883, in the following case, namely, in case 3578, wherein it was complainant and The Toledo, Delphos and Burlington R. R. Co. and Granville D. Braman were defendants; in case 3576, wherein your orator was complainant and
4 The Toledo, Delphos and Burlington R. R. Co., The Toledo, Cincinnati, and St. Louis R. R. Co., and Granville D. Braman were defendants; in case 3577, wherein your orator was complainant and The Toledo, Delphos and Burlington Railroad Co., The Toledo, Cincinnati and St. Louis Railroad Company, and Granville D. Braman were defendants, and in case # 3579, wherein your orator was complainant and The Iron Railroad Company, The Toledo, Delphos and Burlington Railroad Co., and The Toledo, Cincinnati and St. Louis Railroad Co. and Granville D. Braman were defendants.

Your orator further says that the object of said bill of complaint in said case 3578 was to foreclose a mortgage made by the Toledo, Delphos and Burlington Railroad Company in favor of your orator upon the said railroad of the Toledo, Delphos and Burlington R. R. Co., heretofore known as the Dayton and Southeastern railway, which was in subsequent proceedings also known as the Southeastern Division, extending from Dayton, Ohio, to a connection with the Ironton and Huntington R. R. near Ironton, in Lawrence county, Ohio, being 180 miles in length.

The object of said bill of complaint in said case 3576 was to foreclose a mortgage made by the Toledo, Delphos and Burlington railroad, extending from Dodds, the northern terminus of said Cincinnati Northern railway, to a point 7 miles south of the city of
5 Dayton, Ohio, which said railroad in the proceedings in said cause was commonly known as the Cincinnati Division of the Toledo, Cincinnati and St. Louis railroad, and the object of the bill of complaint filed in said case 3577 was to foreclose a mortgage made by the Toledo, Delphos and Burlington Railroad Co. in favor of your orator upon the T., D. & B. R. R. from the city of Dayton to the city of Delphos, both in the State of Ohio; and the object of the bill of complaint in said case 3579 was to foreclose a mortgage made by the Iron Railroad Co. in favor of your orator upon the

railroad of the Iron Railroad Company, extending from Ironton to Wellston, in the State of Ohio.

Your orator further says that by a separate entry, made separately in each of the aforesaid cases, one William J. Craig was appointed receiver respectively of each of said railroads on said 20th day of October, 1883, but with direction to operate said roads as a connected line, keeping separate accounts.

Your orator further says that thereafter, on the — day of October, 1883, similar bills for foreclosure of mortgages, made respectively by other constituent companies on their respective roads, which roads, when connected, would form a line of railroad extending from Delphos to Toledo, Ohio, from said Delphos through Indiana and Illinois to East St. Louis, Ill., were filed in the proper circuit courts of the United States for the northern district of Ohio, the district of Indiana, and the southern district of Illinois by your orator, the mortgagee in each of said mortgages, each
6 bill of complaint praying for the foreclosure and sale separately of each of said roads.

Your orator further says that said Toledo, Cincinnati and St. Louis Railroad Company was a corporation formed by the consolidation, under the respective laws of Illinois, Indiana, and Ohio, of the above-named constituent companies and other companies, extending from St. Louis to Delphos, Ohio, thence to Toledo, and from Delphos to Cincinnati and Ironton; that each mortgage was a separate and distinct mortgage upon separate property, there being no property in one mortgage included in another; that all of said mortgages were made prior to any consolidation and were entirely unaffected thereby.

Your orator further says that on October 27, 1883, R. S. Grant filed his intervening petition in said case # 3554, setting forth that on the 24th day of March, 1883, said R. S. Grant had made a contract with the said Cincinnati Northern R'y Co. (which is prior to its consolidation) for leasing to it 10 locomotives and tenders, Nos. 67 to 76, consecutively, and that said R. S. Grant had delivered the same to said Cincinnati Northern R'y Co. in pursuance of said agreement.

And said petition further alleged that said Toledo, Cincinnati and St. Louis Railroad Company (said Cincinnati Northern R'y having been consolidated with it on the — day of May, 1883) had failed to pay the $1,500 monthly rental due August 10, September 10, and October 10, 1883, respectively, and had failed to pay
7 the half-yearly rental interest due under said contract of lease Oct. 1, 1883, amounting to $21.60, claiming that by said default said Grant was entitled to retake said locomotives and tenders, and that the principal sum, $72,000 six per cent. equipment trust bonds, known as series "F," were due and payable, and that said Grant was the sole owner of the same.

And said petition alleged that there was due from said receiver $4,000 on account of rent for said locomotives, $2,160 on account of half-yearly interest, and $638.33 balance, and the further sum of

$10,000 for alleged depreciation in value of the rolling stock in the use thereof, making a total sum of $16,798.33.

And said petition prayed that said receiver might be ordered to pay said amount and to surrender forthwith to said Grant the locomotives and tenders aforesaid, and to pay said Grant whatever amount might be found to be due upon the sale by him, said Grant, of said locomotives and tenders and the application of the proceeds to the payment of said $72,000, principal and interest of said bonds, and that said amount or balance, when determined, as well as said sum of $16,798.33, might be adjudged a charge upon all the property of said Toledo, Cincinnati and St. Louis Railroad Company, and especially upon the property of the Cincinnati Northern Railway Company, ahead of the first-mortgage bonds secured thereon. A copy of said petition of said Grant is herewith filed, marked "Exhibit 3," and made part hereof, and reference is made thereto.

8 Your orator further says that on the 22nd day of December, 1883, although no process had been issued or asked for in said intervening petition requiring your orator to answer, and without the knowledge of your orator, Bluford Wilson, Esq., counsel for said R. S. Grant, procured two certain orders or decrees to be entered in said case 3554 in this court, purporting to be entered upon said intervening petition of said R. S. Grant filed therein October 27, 1883, which orders, marked "A" and "B" respectively, are in the words and figures as follows:

Order "A."

THE UNITED STATES OF AMERICA, }
Southern District of Ohio, Western Division, } *ss:*

At a stated term of the circuit court of the United States of America within and for the western division of the southern district of Ohio, in the sixth judicial circuit of the United States of America, begun and had in the court-rooms, at the city of Cincinnati, Ohio, in said district, on the first Tuesday of October, being the 2nd day of the month, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States of America the one hundred and eighth—present, the Hon. George R. Sage, district judge—on Saturday, the 22nd day of December, 1883, among the proceedings had were the following, to wit:

9 THE CENTRAL TRUST COMPANY OF NEW YORK, Complainant,
vs.
THE TOLEDO, CINCINNATI AND ST. LOUIS Railroad Company, The Cincinnati Northern Railway Company. } #3554. In Chancery.

In the matter of the intervening petition of R. S. Grant.

The said cause came on to be heard upon the petition and the

answer of the receiver thereto and upon the evidence submitted on behalf of said petitioners.

And it appearing to the satisfaction of the court that the receiver has in his possession Grant locomotive numbered 73, and is using the same in the operation of the said Cincinnati Northern Railway Company between Cincinnati and Dayton, Ohio, and that the said locomotive is one of ten covered by the agreement of lease set out in said petition and was acquired by the said railway company under the terms of said agreement, and was so held at the date of the appointment of the receiver herein;

And it further appearing that the present receiver or his predecessor took the said locomotive with its tender into his possession as such receiver on the first day of August last and has had the same in continuous use and possession since that date without having made any payment on account of rental, as provided in said indenture of lease, or other compensation for the use thereof;

10 And it further appearing that the said locomotive is, in the judgment of the receiver, necessary to the proper operation of said railway and should be acquired as part of its permanent equipment, and that the value of said locomotive as fixed in said agreement of lease is reasonable, and that the petitioner, R. S. Grant, the owner of said locomotive and tender, is willing, upon receipt of the contract price or upon being adequately secured therein, to transfer the title of the same to the receiver;

And the matter being fully heard by the court and upon due deliberation thereon, it is hereby ordered, adjudged, and decreed that the receiver pay to the said petitioner as rental for said locomotive and tender and in full for all claims for rental, interest, and repairs down to the first day of December, 1883, the sum of $770.08, the same being the amount due to said date under the terms of said lease, and the further sum of $7,520.00, balance in full as purchase-money, for said locomotive and tender.

And it is further ordered that the receiver pay said several amounts as part of the operating expenses of the said railway out of any money not appropriated for the payment of current labor, supplies, and taxes.

And it is further ordered and decreed that the said several amounts, with interest thereon at the rate of six per cent. from the first

11 day of December, 1883, shall be a charge upon the earnings, incomes, and all the property of the said Toledo, Cincinnati and St. Louis Railroad Company, and especially of the said Cincinnati Northern Railway Company, as ahead of the first-mortgage or other bonded debt of said company or either of them, and any balance of said several amounts remaining unpaid at the date of the foreclosure and sale of the said railway shall be a first lien thereon, and the said sale shall be made subject thereto.

Order "B."

UNITED STATES OF AMERICA,
Southern District of Ohio, Western Division, } *ss:*

At a stated term of the circuit court of the United States of America within and for the western division of the southern district of Ohio, in the sixth judicial circuit of the United States of America, begun and had in the court-rooms, at the city of Cincinnati, Ohio, in said district, on the first Tuesday of October, being the second day of that month, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States of America the 108th—present, the Hon. George R. Sage, district judge—on Saturday, the 22nd day of December, 1883, among the proceedings had were the following, to wit:

12 THE CENTRAL TRUST COMPANY OF NEW YORK
vs.
THE TOLEDO, CINCINNATI AND ST. LOUIS RAILWAY COMPANY (Dayton and Southeastern Division) *et al.*, Defendants. } In Chancery. # 3554.

In the matter of the intervening petition of R. S. Grant.

The said cause came on to be heard upon the petition and the answer of the receiver thereto and upon the evidence submitted on behalf of said petitioners.

And it appearing to the satisfaction of the court that the receiver has in his possession Grant locomotives # 67, 68, and 72, with their tenders, and is using the same in the operation of the said Southeastern Division of the defendant company's railroad between Dayton and Wellston, Ohio, and that the said locomotives are three of the ten covered by the agreement of lease set out in said petition, and were acquired by said railway company under the terms of said agreement, and were so held at the date of the appointment of the receiver herein;

And it further appearing that the present receiver or his predecessor took the said locomotives into his possession as such receiver on the first day of August last, and has had the same in continuous use and possession since that date without having made any payment on account of the rental, as provided in said indenture of lease, or other compensation for the use thereof;

13 And it further appearing that the said locomotives are, in the judgment of the receiver, necessary to the proper operation of said division of said railway and should be acquired as part of its permanent equipment, and that the value of said locomotives and tenders as fixed in said indenture of lease is reasonable, and that the petitioner, R. S. Grant, the owner of said locomotives and tenders, is willing, upon receipt of the contract price or upon being

adequately secured therein, to transfer the title of the same to the receiver;

And the matter being fully heard by the court, and upon due deliberation thereon, it is ordered, adjudged, and decreed that the receiver pay to the said petitioner as rental for said locomotives, and in full for all claims for rentals, interest, and repairs down to the first day of December, 1883, the sum of $2,311.41, the same being the amount due to said date under the terms of said lease.

And the further sum of $22,560.00, balance in full as purchase-money for said locomotives and tenders.

And it is further ordered that the receiver pay said several amounts as part of the operating expenses of the said Southeastern Division out of any money not appropriated for the payment of current labor, supplies, and taxes.

And it is further ordered and decreed that the said several amounts, with interest thereon at the rate of six per cent. from the first day of December, 1883, shall be a charge upon the earnings, income,
14 and all the property of the said Toledo, Cincinnati and St. Louis Railroad Company, and especially of the said division, prior to the first-mortgage or other bonded debt of said railroad or said division thereof, and any balance of said several amounts remaining unpaid at the date of the foreclosure and sale of the said railroad or said division shall be a first lien thereon, and the said sale shall be made subject thereto.

Your orator further says it had no notice or knowledge that said orders were in contemplation and no notice or knowledge of the entering of said orders or any motion therefor until the 26th day of February, 1884, when it first learned of the fact that said orders had been entered by the announcement thereof by counsel for said R. S. Grant to the judges of the circuit court of the United States for the sixth and seventh circuits while sitting in Indianapolis, Indiana, in conference relative to the claims for rolling stock alleged to be in the hands of the receiver operating the several constituent roads of the said Toledo, Cincinnati and St. Louis Railroad Company.

And your orator says that it thereupon took immediate steps to procure the rescission of said orders, and that thereafter, on March 5, 1884, this court caused orders to be made in said cause 3554 suspending said orders "A" and "B" until the matter thereof should be further enquired into and adjudicated; and thereafter, on
15 the 15th day of said March, by order and leave of this court, your orator filed in said case 3554 certain proceedings entitled "petition for rehearing," &c., wherein were set forth the facts relative to the procurement of said orders "A" and "B," and the errors and irregularities of the same.

Your orator did further pray therein that proceedings entitled "petition for rehearing," &c., be taken either as a petition for rehearing or as a bill of review, according as the rules of courts of equity might require. A copy of said petition is filed herewith, marked "Exhibit No. 4," and is herein referred to.

Your orator further says that the matters contained in said last-

named proceeding were fully heard by the Honorable John Baxter, circuit judge of the sixth circuit of the United States, and that the said R. S. Grant appeared at said hearing in opposition to said petition for rehearing, and after argument and proof and upon due consideration thereof the said circuit judge made and entered in said case 3554, on April 10, 1884, a certain order or decree, whereby the court did wholly rescind, set aside, and hold for naught said orders "A" and "B," and did further in said order of April 10, 1884, adjudicate and settle the rights of said R. S. Grant in reference to locomotives # 67 to 76, both inclusive, as well as the rights of sundry other owners of leased rolling stock who had filed similar intervening petitions in said case, the court decreeing that all
16 said owners, including the said R. S. Grant, were entitled to the immediate return, if they so desired, of their rolling stock, including said locomotives, and also compensation from the receiver in said case for the use of said stock by him, and also remuneration for deterioration of said rolling stock, if any, beyond ordinary wear and tear.

And the court in said order direct- said receiver to surrender any of said rolling stock to the owners thereof upon demand, and did also in said order refer said matter of compensation to a special master to take evidence thereon and report upon the same, all of which was done. A copy of said order of April 10, 1884, is filed herewith and marked "Exhibit # 5," and the same is referred to herein as part hereof.

And your orator further says that said R. S. Grant and the Grant Locomotive Works, a corporation, which in the meantime had filed in said case 3554, on the — day of June, 1884, an intervening petition praying compensation for locomotive # 63, took part in all the proceedings before said master by claiming and proving compensation aforesaid for said locomotives.

And your orator further says that when said railroad was sold on foreclosure in said case 3554, on the — day of July, 1885, it was not sold subject to any claim or lien for said locomotives, and none of said locomotives were included in said sale, but were treated as the property of said R. S. Grant; and thereupon the said R. S.
17 Grant and the Grant Locomotive Works retook said locomotives numbered 57 to 66, inclusive, and 67, 68, 72, and 73, according to their respective ownerships of the same, and all the right, title, and interest of the same, and still have the same, whereby your orator understood and charges the fact to be that they severally and according to their respective interests therein abandoned all claim under said orders "A" and "B" of Dec. 22, 1883, and neither your orator nor the purchasers of said railroad at said foreclosure knew aught to the contrary until on the — day of February, 1887, when the said Grant Locomotive Works and the said R. S. Grant—the circuit judge, Hon. John Baxter, having in the meantime departed this life, and his successor having been appointed and qualified—filed petitions in said case 3554 to set aside said orders of April 10, 1884, which petitions this court, on June 11, 1887, granted by an order then entered in said case 3554, whereby this court did

set aside said orders of April 10, 1884, and did adjudge the same to be null and void, and did restore said orders "A" and "B" of Dec. 22, 1883.

And thereafter, on the 3rd day of November, 1888, said R. S. Grant filed his motion in said case 3554 to pay into court the several amounts mentioned in said orders "A" and "B;" and thereupon your orator prayed said court to treat said proceedings of March 15, 1884, entitled "petition for rehearing," &c. (Exhibit 4 to this bill), as a bill of review to correct said orders "A" and "B" of Dec.
18 22, 1883, and then to permit your orator to amend said proceedings of March 15, 1884, by adding thereto the averments contained in this bill of review and to docket the same as thus amended as an original bill of review as of date March 15, 1884.

The court refused to allow the same to be done and ordered that said Cincinnati Northern Railway should be resold unless the respective amounts named in said orders "A" and "B" of December 22, 1883, should be paid within 60 days by the purchaser of said railroad sold at foreclosure sale in said case 3554. A copy of said order is herewith filed as Exhibit "6" and referred to as part hereof.

Your orator says it was impossible for it to file a bill of review to correct said orders at any time between March 15, 1884, and June 11, 1887, because said orders had by said order of April 10, 1884, been set aside and annulled, and your orator was compelled to so regard them and did so regard them during said period, and was during said period thereby debarred from taking any steps to correct said orders "A" and "B."

And, moreover, your orator says that during said period from March 15, 1884, to June 11, 1887, it believed and had the right to believe that said R. S. Grant and said Grant Locomotive Works had abandoned all claim of right under said orders "A" and "B" of December 22, 1883; and so your orator says that said period of time between March 15, 1884, and June 11, 1887, ought not be counted against it in filing its bill of review.

19 And your orator says both said orders "A" and "B" of December 22, 1883, are erroneous and ought to be reviewed, reversed, and set aside for the many errors and imperfections common thereto—that is to say:

1. Because both said orders were entered without any hearing, without any process issued to your orator, without any knowledge of or notice to your orator, and without any evidence being adduced to the court in support thereof.

2. Because said orders found that the "present receiver" or his predecessor took the locomotives mentioned in said orders into his possession on the 1st day of August, 1883, and that he had had the same in continuous use and possession since that day, and had made no payment on account of the rental thereof, as was provided in said indenture of lease, or other compensation for the use thereof, whereas the record in this case shows that William J. Craig was not

appointed receiver in case 3554 until October 20, 1883, and that he had no predecessor whatever.

3. Because said orders found that the value of said locomotives and tenders, in the judgment of the receiver, as fixed in said agreement was reasonable, whereas no evidence was adduced to show that said price was reasonable, or that said Craig, receiver, considered it reasonable, or that he was a judge of such values, and in that said price was more than twice the value of said locomotives at said time; and, second, because said orders found that the
20 reasonableness of said price existed in the judgment of the receiver only, which judgment of the receiver, in the absence of evidence thereon, would not authorize the entering of said orders.

4. Because said orders were entered by the court under a misapprehension of fact and by inadvertence, in this, that the court which ordered the entering thereof made no examination thereof, and was informed by counsel of said R. S. Grant, Bluford Wilson, Esq., that the entry of said orders had been assented to by your orator, representing the bondholders under the first mortgage sought to be foreclosed in said cause, and in that belief the court entered said orders, which it would not otherwise have done except after full hearing, whereas your orator says it never assented to the entry of said orders and had no knowledge therefor, as hereinbefore stated.

5. Because said orders are a departure from the established practice of the court and are erroneous and void.

6. Because said orders were and are erroneous, if not void, in that they were not the deliberate judgment of the court upon the facts of the record, and in that the matter presented by the petition was not at issue or ready for hearing when said orders were entered.

7. Because it was erroneous, as shown by the record, to order that the receiver should pay any rental or repairs for the locomotives and tenders included in said orders from the first day of August, 1882, — the first day of December, 1883, namely, by order "A"
21 the sum of $770.08, and by order "B" the sum of $2,311.41.

8. Because in the entering of said orders the proper forms for the administration of justice were disregarded, the functions of the court were abnegated, and there was no hearing and decision by the court, and counsel for the said R. S. Grant was allowed to prepare and enter said orders as he thought fit, the court being under the erroneous belief that the said orders were assented to by your orator.

9. Because said orders purported to make said contract price of said locomotives and tenders and the said entire rentals and repairs thereof a charge upon the Cincinnati Northern railway and the Toledo, Delphos and Burlington railroad prior to mortgages on the same foreclosed respectively in said cases 3578 and 3554 instead of upon said entire consolidated railroad to the extent of the whole number of locomotives and tenders included in said orders.

10. Because said orders are fraudulent and void.

11. Because of other imperfections and errors appearing in said orders and in the record of said cases 3554 and 3578, which are filed herewith as part hereof.

Your orator further says that said order "A" of December 22, 1883,

ought to be reviewed, reversed, and set aside for its special errors and imperfections—that is to say:

1. Because said order "A" is fraudulent, in this, that it
22 finds that said locomotive 73 was in the possession of the receiver of the Cincinnati Northern railway in case 3554, and that said receiver was using the same in the operation of said Cincinnati Northern Railway Company between Cincinnati & Dayton, Ohio, whereas, in fact, said locomotive was not in use upon said Cincinnati Northern railway at said date, and if it was upon the tracks thereof it was so not exceeding one day casually and temporarily and not for use as part of the equipment of said Cincinnati Northern railway; all of which said R. S. Grant and his counsel well knew.

2. Because said order is not warranted by the allegations made and relief prayed for in the petition of said R. S. Grant filed in said case 3554.

3. Because said statements in said order that the court was satisfied that the receiver in said case 3554 had in his possession the locomotive in question are not only untrue in fact but were without evidence to sustain them.

4. Because it is erroneous, as shown by the record, to order that the receiver should pay any rental or repairs for locomotives and tenders included in said order "A" from the first day of August, 1882, to the first day of December, 1883, namely, the sum of $770.08.

5. Because said order is uncertain and ambiguous, in this, that it charges the amounts therein named as a first lien upon the Toledo,
Cincinnati and St. Louis railroad, but orders the receiver to
23 pay the same as part of the operating expenses of the Cincinnati Northern railway out of moneys not appropriated for the payment of current labor, supplies, and taxes.

And your orator says that said order "B" of December 22, 1883, ought to be reviewed, reversed, and set aside for its special errors and imperfections—that is to say:

1. Because said order "B," while it purports to find that locomotives Nos. 67, 68, and 72 with their tenders were in the use and possession of the receiver appointed and acting in said case 3554, finds also that they were in use on the Southeastern Division, meaning that part of the Toledo, Delphos and Burlington railroad known as the Southeastern Division, and purports to make the amounts found due thereon in said order "B," namely, the sum of $2,311.41 for rental, interest, and repairs, and the sum of $22,560 balance in full of purchase-money, a lien upon said Southeastern Division, a distinct and separate property and interest in no way involved in or affected by the proceedings in said case 3554, in which case alone said order was entered.

2. Because said order is fraudulent, in this, that it finds that said locomotives Nos. 67, 68, and 72 were in the possession of the receiver, namely, the receiver appointed and acting in said case 3554, at the date of said order, and that the said receiver was using the same in
the operation of the said Southeastern Division between Day-
24 ton and Wellston, whereas, in fact, locomotives were not in use

upon the said Southeastern Division at said date, and if they were upon the tracks thereof they were so only casually and temporarily and not for use as part of the equipment of said Southeastern Division; all of which said R. S. Grant and his counsel well knew.

3. Because said order "B" was and is erroneous, as shown by the record, in that it ordered that the receiver, meaning the receiver appointed and acting in case 3554, should pay the rental and repairs for said locomotives and tenders Nos. 67, 68, and 72 from the first day of August, 1882, to the first day of December, 1883, namely, the sum of $2,311.41.

4. Because said order "B" is erroneous and void, in that it charged the several amounts found due, with interest, upon the earnings, income, and all the property of said Southeastern Division of the Toledo, Delphos and Burlington railroad ahead of the first-mortgage or other bonded debt of said Southeastern Division, which said railway nor any of the property appurtenant thereto is not involved in or in anywise affected by any of the proceedings in said case 3554.

Your orator further says that since said 22nd day of December, 1883, said R. S. Grant has retaken and now has possession of locomotives Nos. 67, 68, and 72, included in said order "B" of December 22, 1883, but has given no credit therefor on account of the
25 sum sought in said order "B" to be charged in case # 3554 upon said Southeastern Division, the railroad involved in case 3578, nor in the order entered directing resale of railroad foreclosed in said case to satisfy — found due in said order "B."

May it please your honors to grant unto your orators the writ of subpœna of the United States to be directed to said R. S. Grant, commanding him, at a certain day and under a certain pain therein to be specified, personally to be and appear before your honors and this honorable court, and then and there to answer all and singular the premises, and to stand to, perform, and abide such order and decree therein as to this honorable court shall seem meet, and that said process of subpœna be served upon Bluford Wilson, Esq., or B. H. Bristow, Esq., counsel of record in said case 3554, of said R. S. Grant, and now present in this court representing said R. S. Grant in the matters herein set forth.

In tender consideration whereof, and for that there are divers errors and imperfections in said orders and proceedings, by reason whereof the same ought to be reviewed, reversed, and set aside—

Your orator prays that said R. S. Grant may be required to answer the premises, and that your orator may be *required* in all and singular the premises according to the course of equity and good conscience.

EDWARD COLSTON,
Solicitor for Complainant.

26 EDWARD COLSTON,
Counsel for Complainant.

STATE OF OHIO, }
Hamilton County, } *ss:*

Edward Colston, being by me first duly sworn, says that he is the

attorney of The Central Trust Company, complainant, and that the facts stated in the foregoing bill of review are true, as he believes.

EDWARD COLSTON.

Sworn to before me and subscribed in my presence this 10th day of January, 1889.

JOHN FLACK WINSLOW,
Notary Public, Hamilton County, Ohio. [SEAL.]

27 And afterwards, to wit, on the 28th day of January, A. D. 1889, there was issued out of the clerk's office of said court our certain subpœna, directed to the marshal of said district and against the defendants herein. Said subpœna is clothed in the words and figures following, to wit:

THE UNITED STATES OF AMERICA, } *ss:*
Southern District of Ohio, }

The President of the United States of America to the marshal of the southern district of Ohio, Greeting:

You are hereby commanded to summon R. S. Grant, citizen of and resident in the State of Ohio, if he be found in your district, to be and appear in the circuit court of the United States for the southern district of Ohio aforesaid, at Cincinnati, on the first Monday in April next, to answer a certain bill of review filed and exhibited in said court against him by the Central Trust Company, a corporation and citizen of and resident of the State of New York.

Hereof you are not to fail under the penalty of the law thence ensuing; and have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of
28 the United States, this 28th day of January, A. D. 1889, and in the 113th year of the Independence of the United States of America.

Attest: [SEAL.] B. R. COWEN, *Clerk.*

MEMORANDUM.—The said defendants are required to enter their appearance in this suit in the clerk's office of said court on or before the first Monday of March, 1889; otherwise the said bill may be taken *pro confesso.*

B. R. COWEN, *Clerk.*

And afterwards, to wit, on the 29th day of January, A. D. 1889, came the marshal to whom the aforesaid subpœna was in form directed, and filed in the clerk's office of said court the same, with his proceedings endorsed thereon, in the words and figures following, to wit:

Marshal's Return.

Received this writ at Cincinnati, Ohio, on the 28th day of January, 1889, and at said Cincinnati, Ohio, on the same day, I served

the within-named R. S. Grant by handing a true copy of this writ, having all the endorsements thereon, personally to Bluford Wilson, Esq., solicitor of record in cases # 3554 and 3578
29 of this court, for the said defendant, R. S. Grant.

H. C. URNER, *U. S. Marshal*,
By RICHARD C. ROHNER, *Deputy*.

Service	2 00
Copy	50
1 mile	06
	$2 56

And afterwards, to wit, on the 29th day of January, A. D. 1889, an entry was made upon the journal of said court clothed in the words and figures following, to wit:

This day this cause came on to be heard on the motion of Bluford Wilson, Esq., solicitor for said R. S. Grant, to strike the bill of review from the files, and was argued by counsel, and the court being advised in the premises, it is ordered, adjudged, and decreed that said bill of review be, and the same hereby is, stricken from the files of this court; and thereupon came the complainant and prayed an appeal to the Supreme Court of the United States, which is allowed upon the complainant executing a bond, with sufficient security, in the sum of $250.

30 And afterwards, to wit, on the 31st day of January, A. D. 1889, the following appeal bond was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Appeal Bond.

Circuit Court of the United States, Southern District of Ohio, Western Division, *ss*:

THE CENTRAL TRUST COMPANY OF NEW YORK
vs.
R. S. GRANT.

Know all men by these presents that we, the Central Trust Company of New York, as principal, and Leo A. Brigel and Richard Folsom, as sureties, are held and firmly bound unto R. S. Grant in the sum of two hundred and fifty dollars, to be paid to the said R. S. Grant, his executors or administrators; to which pay-
31 ment, well and truly to be made, we bind ourselves and each of us jointly by these presents.

Sealed with our seals. Dated this 31st day of January, 1889.

Whereas the above-named The Central Trust Company of New York has taken out an appeal to the Supreme Court of the United States of America to reverse the decree rendered in the above-

entitled action by the circuit court of the United States for the southern district of Ohio:

Now, therefore, the condition of this obligation is such that if the above-named The Central Trust Company of New York shall prosecute its said appeal to effect and answer all costs if it shall fail to make good its plea, then this obligation to be void; otherwise to remain in full force and virtue.

LEO A. BRIGEL. [SEAL.]
RICHARD FOLSOM. [SEAL.]

Sealed and delivered in presence of—
GEORGE C. WRIGHT.
ROB'T C. GEORGI.

The above security is approved.

HOWELL E. JACKSON,
Circuit Judge of the United States, S. D. O.

32 SOUTHERN DISTRICT OF OHIO, *ss:*

I, Leo A. Brigel, one of the sureties above named, do solemnly swear that after paying my just debts and liabilities I am worth thirty thousand dollars in real estate in my own name situate in the county of Hamilton, in said district.

LEO A. BRIGEL.

Sworn to before me the 31st day of January, 1889.

[SEAL.] ROB'T C. GEORGI,
Deputy Clerk of the U. S. Circuit Court, S. D. O.

SOUTHERN DISTRICT OF OHIO, *ss:*

I, Richard Folsom, one of the sureties above named, do solemnly swear that after paying my just debts and liabilities I am worth ten thousand dollars in real estate in my own name situate in the county of Hamilton, in said district.

RICHARD FOLSOM.

Sworn to before me the 31st day of January, 1889.

ROB'T C. GEORGI,
[SEAL.] *Deputy Clerk of the U. S. Circuit Court, S. D. O.*

33 THE UNITED STATES OF AMERICA, }
Southern District of Ohio, Western Division, } *ss.*

I, Benjamin R. Cowen, clerk of the circuit court of the United States within and for the division and district aforesaid, do hereby certify that the foregoing is a true and complete transcript of the proceedings had by and before said court in the above-entitled cause.

Seal of the Circuit Court, South'n Dist. of Ohio.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of Cincinnati, O., this 12th day of March, A. D. 1889.

B. R. COWEN, *Clerk*,
By R. C. GEORGI, *Deputy*.

34 [Endorsed:] No. 4217. United States circuit court, southern district of Ohio, western division. The Central Trust Co. of New York *vs.* R. S. Grant. Transcript. —— ——, plaintiff's attorney.

35 Circuit Court of the United States, Sixth Circuit and Southern District of Ohio, Western Division.

THE CENTRAL TRUST COMPANY OF NEW YORK, a Corporation,
vs.
THE TOLEDO, CINCINNATI AND ST. LOUIS RAILROAD Company, The Cincinnati and Northern Railway Company, The Spring Grove, Avondale and Cincinnati Railway Company, and Grenville D. Braman.
} In Chancery.

Bill in Equity.

To the judges of the circuit court of the United States for the southern district of Ohio:

The Central Trust Company of New York, a corporation under the laws of the State of New York and a citizen thereof, brings this its bill of complaint against the Toledo, Cincinnati and St. Louis Railroad Company, claiming to be a corporation under the laws of Ohio, and the Cincinnati Northern Railway Company, a corporation under the laws of Ohio, and the Spring Grove, Avondale and Cincinnati Railway Company, a corporation of Ohio, and Grenville D. Braman, a citizen of the State of Massachusetts; and your orator complains and says—

36 That on the first day of October, A. D. 1880, the Cincinnati Northern Railway Company, a corporation under the laws of Ohio, being then engaged in the construction and equipment of a certain railroad and appurtenances from the city of Cincinnati, in the county of Hamilton and State of Ohio, northwardly in and through the counties of Hamilton Butler, and Warren, in said State, to the village of Waynesville, in said county of Warren, did, by its president and secretary, under its corporate seal and in pursuance of a resolution to that end adopted by the board of directors of said corporation on the 16th day of August, 1880, which was subsequently and before the execution of the bonds and of the indenture hereinafter mentioned duly ratified by all the stockholders of said corporation, execute one thousand of its bonds for the sum of one thousand dollars each, dated the said first day of

October, A. D. 1880, payable on the first day of October, A. D. 1920, said bonds bearing six per cent. interest per annum, payable semi-annually on the first days of April and October in each and every year at the city of New York, each having interest warrants for thirty dollars each thereto attached for payment of the interest as aforesaid; and said Cincinnati Northern Railway Company issued and sold one thousand of said bonds with said interest warrants attached, which are now in the hands of divers and sundry persons as holders thereof, and with the proceeds of sale of said bonds the said corporation constructed and equipped said railway.

And your orator further represents, that, in order to secure said bonds and the payment of the said interest as the same should mature, the said Cincinnati Northern Railroad Company did, on
37 said day, in pursuance of the further provision of said resolution, execute and deliver unto your orator a certain deed or indenture, whereof a true copy is hereto attached, marked Exhibit A, and thus made part of this bill, which indenture was duly recorded on the 17th day of November, A. D. 1880, in the several counties in and through which said railway extended, whereby it did grant, bargain, sell, and convey, in fee simple, unto your orator, its successors and assigns, all and singular the aforesaid railroad, known as the Cincinnati Northern railway, from Cincinnati, in Hamilton county, Ohio, to Waynesville, in Warren county, Ohio, and passing through and into the counties of Hamilton, Butler, and Warren, in the State of Ohio, about forty-two miles in length, constructed and to be constructed, together with all the real and personal property of said company connected with said railroad, and its incomes derived therefrom, and its lands, tenements, and hereditaments, rights of way, fixtures, buildings, bridges, structures, fences, railways, and branches, side tracks, rails, ties, locomotives, tenders, engines, cars, carriages, equipment, rolling stock, machinery, tools, implements, material, chattels, franchises, and privileges, rights, interests, income, rents, reservations, resources, benefits, investments, assets, and estates, legal and equitable, which were then owned or should thereafter be owned or acquired by said company as part of or in connection with the said railroad or in any way appertaining or belonging to said railroad, and also all the personalty and movable property of the said Cincinnati Northern Railway Company, including all its locomotives, engines, tenders, cars,
38 carriages, equipment, rolling stock, machinery, tools, implements, material, chattels of every kind and character, whether used or situated either upon the line of said company's railroad or elsewhere, then owned or thereafter to be acquired by said company; to have and to hold the above-mentioned property and assets thereby conveyed or intended to be conveyed, with all and singular the reversions, remainders, issues, privileges, and appurtenances then or thereafter belonging or in anywise appertaining thereto, unto your orator and to its successors and asssgns forever, in trust, nevertheless, for the persons and corporations and for the benefit, security, and protection of the persons, firms, and corporations who should hold the bonds and interest warrants aforesaid or any or

either of them, and for enforcing the payment thereof when payable, in accordance with the true intent and meaning of the stipulations of said deed of trust or mortgage and of said bonds and of said interest warrants.

And your orator further shows that in and by said mortgage or deed of trust to your orator it was provided, and the said Cincinnati Northern Railway Company did therein covenant and agree, that if any default should be made in the payment, when due, of any interest upon any of said bonds, and such interest should remain unpaid and in arrear for the space of three months, or in case of default made in the payment of the principle of any of said bonds, then the said Cincinnati Northern Railway should, upon demand of your orator or the trustees of said trust deed for the time being, forthwith surrender to your orator, or such trustees or their
39 agent or agents, the actual possession of all and singular the property, assets, and estate conveyed or intended to be conveyed in said indenture, to hold, use, manage, and receive the rents, issues, and income and profits thereof for the benefit of the holders of said bonds — from time to time all needful repairs and alterations, additions, and paying all proper costs, charges, and expenses of so taking, holding, and managing the same, including a reasonable compensation to said trustees from the income thereof, and applying the residue to the payment *pro rata* to and among the parties entitled thereto of the overdue interest on said bonds, with interest thereon and the interest accruing during such possession, but such possession was not to be taken unless your orator or such other trustee should be thereto requested in writing by the holders of at least one-third in amount of said bonds.

And your orator further represents that it was also provided in said mortgage or deed of trust that if any default should be made in the payment when due of interest on any of said bonds when and as it might accrue, then upon the happening of any such default your orator or any successor to it in the trusts of said deed might take proper legal proceedings to enforce the rights of the holders of said bonds upon being thereto requested in writing by the holders of one-third in amount of the bonds aforesaid, and that the proceeds arising from any sale made in pursuance thereof should be applied—first, to pay your orator or such other trustee all reasonable costs, charges, and expenses, and to indemnify it
40 or them against all liability in the premises; second, to pay the holders of said bonds in full or in equal proportion the principle and interest of said bonds then outstanding without priority in lieu of interest over principle or of one bond over another; third, the surplus, if any, remaining after the payment in full of all said bonds, principle and interest, including the interest on overdue interest, should be paid to your orator, its successors and assigns.

And your orator further represents that it was provided in said mortgage or deed of trust that upon a sale of said premises and property by virtue of the judgement and decree of any court of competent jurisdiction rendered in any suit or proceeding for the enforcement or foreclosure of the lien of said trust deed or mortgage the prin-

cip*le* of all the aforesaid bonds should become and be immediately due and payable; and it was further provided therein that upon payment in full of the interest and princip*le* of said bonds said deed of trust or mortgage should be null, void, and of no effect.

And your orator further represents that the said Cincinnati Northern Railroad Company has failed to pay the interest on said bonds, and has made default therein to all the holders thereof, and among others to Charles Rice, a holder of eleven of said bonds, to whom, as well as to all the holders of said bonds and coupons, said company has failed to pay the interest warrants or coupons due thereon October 1st, A. D. 1882, and April 1st, A. D. 1883, and the same have ever since remained unpaid, although payment of same was duly demanded at the city of New
41 York, and the holders of one third in amount of said bonds to whom such default has been made have served upon your orator a written demand requiring your orator to institute the necessary legal proceedings to foreclose said mortgage and sell the said railway and property of the Cincinnati Northern Railway Company, and for the appointment of a receiver of said property separately, and to take such other and further steps necessary and proper for the protection of the rights of the holders of said bonds as your orator may be authorized to take by said deed of trust or mortgage; and your orator deems it for the interest of the parties concerned, particularly of the holders of the said first-mortgage bonds and coupons, to institute judicial proceedings for the foreclosure of said mortgage or deed of trust and for the sale of all the premises and property thereby conveyed, and for the appointment of a separate receiver to take possession of, operate, and control the said railroad and its branches and leased lines, and to take an inventory of all the personal or movable property included in said mortgage, and to keep an account of the earnings and of the expenses incurred in operating the said railway and its leased lines.

And your orator further says that on and prior to the 25th day of April, A. D. 1881, the Spring Grove, Avondale, and Cincinnati Railway Company was a corporation duly organized under the laws of Ohio, engaged in locating, constructing, and equipping a line of railway from a point in the city of Cincinnati, Hamilton county, Ohio, south of Court street and west of Broadway, to Spring Grove cemetery, in said county, and part of said road had at that time been constructed and was ready for use; and thereafter, on
42 or about said last-named day, said Cincinnati Northern Railway Company leased for a term of ninety-nine years, renewable forever, the tracks, road-bed, rights of way, property, privileges, and franchises then owned or thereafter to be acquired by the said Spring Grove, Avondale and Cincinnati Railway Company, with the privilege of purchasing the same at any time after three years for the sum of five thousand dollars; and in consideration of the said lease the said Cincinnati Northern Railway Company, among other things, agreed to and did execute and deliver to your orator, on the 25th day of May, 1881, its certain deed of trust by way of mortgage, a true copy whereof is filed with this bill as Exhibit "B,"

whereby it conveyed to your orator as such trustee all its property, rights, and franchises whatsoever then owned or thereafter to be acquired by it to secure the payment, as the same might mature, of the principle and interest of one million dollars of mortgage bonds theretofore issued by the said Spring Grove, Avondale and Cincinnati Railway Company, secured on its said road, payable July 1st, 1921, with interest warrants thereto attached for the payment of interest thereof at the rate of six per cent. per annum, payable semi-annually on the first days of January and July of each and every year.

And it was therein and by said last-named deed of trust or mortgage agreed by and between your orator and the said Cincinnati Northern Railway Company that the lien of said mortgage should be second only to the lien of the deed of trust or mortgage upon the same property, rights, and privileges hereinbefore set forth.

43 And your orator further says that the interest on said bonds has not been paid, but that both the said Spring Grove, Avondale and Cincinnati Railway Company and the said Cincinnati Northern Railway Company have failed to pay the same, and have made default therein to all holders of said bonds to whom said companies have failed to pay the interest warrants or coupons thereon due the first day *day* of January, 1883, and the first day of July, 1883, and the same have never been paid.

And your orator represents, further, that the foregoing mortgage was duly recorded in the proper counties, and that the same is a second lien or incumbrance upon all the premises and property hereinbefore described and mentioned of the said Cincinnati Northern Railway Company.

And your orator further represents that the said Cincinnati Northern Railway Company, proper corporate action for that purpose having first been had, did, on the 25th day of May, A. D. 1881, deliver to your orator, as trustee, a certain other indenture (a true copy whereof is herewith filed as Exhibit "C"), whereby it granted, bargained, sold, and conveyed unto your orator, as trustee, all the railroad, property, rights, franchises, goods, and chattels described or mentioned in the mortgage first set forth in this bill, then owned and thereafter to be acquired, to secure the payment at maturity of the principle of one thousand bonds of the said Cincinnati Northern Railway Company, known as income bonds, for one thousand dollars each, numbered consecutively from 1 to 1000, inclusive,

44 payable on the 1st day of April, 1921, and of such interest upon the said bonds as by the terms of said bonds and of said indenture might be due and payable.

And your orator further says that it was by said indenture last mentioned expressly agreed that the interest upon said bonds was not to accrue or to be payable except out of net earnings of said Cincinnati Northern railway applicable to that purpose, and when the amount thereof should be ascertained and declared by said board of directors of said last-named company, whose duty it was by the terms of said indenture in each year during the currency of said bonds, beginning with the year 1882, in the month of January, to

declare what amount, if any, of net earnings had been made during the preceding year which was justly applicable to the payment of interest on said income bonds, and such ascertainment of net earnings was to be made by deducting from gross earnings all operating expenses, including rebates, taxes, insurance, rent, interest on floating debt and borrowed money, and payment made on principle thereof and liabilities for interest on the said first-mortgage bonds of the said railway company.

And your orator further says that said mortgage was duly recorded in each of the various counties in and through which the said railway extended.

And your orator further represents, on information and belief, that one thousand of the said bonds so secured as aforesaid by said indenture have been issued and disposed of by said Cincinnati Northern Railway Company and are now in the hands of
45 divers and sundry persons as owners thereof unknown to your orator.

And your orator further represents that no interest has become or is now due or payable on said bonds under the terms thereof and of said indenture owing to insufficiency of earnings, but that the principle of said bonds issued as aforesaid is a lien upon said property, rights, franchises, etc., of said Cincinnati Northern Railway Company next after the mortgage hereinbefore secondly described.

And your orator further says that on the fifth day of May, A. D. 1883, a certain corporation by the name of the Toledo, Cincinnati and St. Louis Railway Company, claiming to be a corporation of the States of Ohio, Indiana, and Illinois, by virtue of certain consolidations, and claiming to have power to construct, maintain, and operate a railroad from the city of Toledo, in the State of Ohio, to the town of Delphos, in said State, and thence through the States of Indiana and Illinois into the city of East St. Louis, in said last-named State, and from the said town of Delphos to a connection with the said railroad of the Cincinnati Northern Railway Company at or near Dodds, in the county of Warren, in the State of Ohio, entered into an agreement with the said Cincinnati Northern Railway Company and the said Spring Grove, Avondale and Cincinnati Railway Company, corporations as aforesaid, whereby said three corporations undertook, under the name of the Toledo, Cincinnati and St. Louis Railroad Company, to consolidate and unite the said lines of railroad at their said respective points of connection, and to
46 consolidate the capital stock of the said respective companies under the laws of Ohio, and to transfer and vest in said consolidated company, to wit, The Toledo, Cincinnati and St. Louis Railroad Company, defendant in this bill of complaint, all the powers, privileges, immunities, and property, real, personal, and mixed, belonging to the respective companies parties to said agreement of consolidation, said consolidated company xpressly recognizing and affirming the said several mortgages hereinbefore mentioned and the said bonds and coupons secured thereby and assuming payment of same, the capital stock of said consolidated company to be thirty

millions of dollars, of which eleven millions *was* to be preferred stock and the balance thereof to be common stock. A true copy of said agreement of consolidation is filed herewith as Ex-ibit " D," to which reference is made as part of this bill.

And your orator further represents that it is informed and believes that said agreement of consolidation was acted under by said companies from said date, although your orator says neither it nor any holder of said bonds or coupons was party to said consolidation or has assented thereto or acquiesced therein.

And your orator further says that it is claimed by the said consolidated company, the said Toledo, Cincinnati and St. Louis Railroad Company, that it owns, by virtue of said consolidation, all the aforesaid property, real, personal, and mixed, rights, franchises, and assets and credits of the said Cincinnati Northern Railway Company and of the Spring Grove, Avondale and Cincinnati Railway
47 Company, and that the same have become subject to the debts and liabilities of the said consolidated company; but your orator says that whatever rights, if any, in or to the same the said Toledo, Cincinnati and St. Louis Railroad Company acquired by virtue of said consolidation the same are subject and subordinate to all the mortgages hereinbefore stated, and that the railroad, property, franchises, rights, and assets of the said Cincinnati Northern Railway Company are not nor were they at the time of said consolidation more than sufficient to pay its said first-mortgage bonds and interest secured thereon by said first mortgage, and are of much less value than the amount of all the bonds and interest secured thereon by the several mortgages hereinbefore mentioned; but your orator says that the net earnings of the said Cincinnati Northern Railway and of the said The Spring Grove, Avondale and Cincinnati Railway Company are sufficient, as it believes, if kept seperate, to pay the interest warrants or coupons of said first-mortgage bonds of said Cincinnati Northern Railway Company, but that the said Toledo, Cincinnati and St. Louis Railroad Company claims that the earnings of the said Cincinnati Northern Railway Company and its said leased line should go into the common fund of said consolidated company, and that no account should be kept of the seperate earnings and expenses thereof, and the earnings and income of the said Cincinnati Northern Railway Company and its said leased line are now and ever since said consolidation have been received
48 & 49 and taken by said consolidated company, the said Toledo, Cincinnati and St. Louis Railroad Company, which is hopelessly insolvent, and appropriated to pay the expenses of said consolidated company, and wholly diverted from the payment of the interest or any part thereof due upon the said bonds of the said Cincinnati Northern Railway Company; and your orator further says that unless such seperate account of the earnings and expenses of said Cincinnati Northern Railway Company be carefully kept and preserved it will be impossible to ascertain whether any interest shall have become due or payable upon the income bonds hereinbefore described.

Wherefore, and forasmuch as your orator is without remedy at

law, your orator brings this its bill of complaint in equity in behalf of all the holders of bonds and coupons secured by said mortgage herein first mentioned, and prays that Grenville D. Draman, who claims some interest, and the said Cincinnati Northern Railway Company and the said The Spring Grove, Avondale and Cincinnati Railway Company be made defendants hereto, and the said consolidated company, the Toledo, Cincinnati and St. Louis Railroad Company, may be made to answer as to its interest; that process of subpœna may issue against each of them, and that they be required to make answer respectively to all and singular the allegations and charges herein contained; that said mortgaged property be seperately sold at judicial sale, free of the claims of all parties hereto, upon such terms and conditions as this honorable court may deem
50 most to the interest of the holders of said first-mortgage bonds and coupons, and that out of the proceeds of such sale the amount of bonds and interest secured by said first mortgage or deed of trust to your orator may be paid to your orator as trustee for the holders of said bonds and coupons secured by said second and third mortgages on said Cincinnati Northern railway in the order of priority, and that meanwhile and until such sale a receiver, other than the receiver heretofore appointed for the said consolidated company, may be appointed of all and singular the premises aforesaid embraced within the said mortgage or deed of trust hereinbefore first set forth, and that he be authorized and empowered to maintain and operate said railroad of the said Cincinnati Northern Railway Company, including said Spring Grove, Avondale and Cincinnati railway, and to exercise all the powers usually granted to receivers, and to receive and collect all rents and other income from any of said mortgaged property, and to preserve the same and all parts of the said mortgaged premises and property from waste and loss, and to pay the rent on leased premises, and to carry out such contracts and agreements of said Cincinnati Northern Railway Company as may be to the interest of the said several parties therein interested, and for such other and further relief as in equity and good conscience your orator may be entitled to.

HOADLEY, JOHNSON & COLSTON,
Counsel for the Central Trust Company of New York.

51 UNITED STATES OF AMERICA, }
State of Ohio, Hamilton County, } *ss:*

Edward Colston, being duly sworn, says he is agent and solicitor for The Central Trust Company of New York, complainant in above bill, and that the facts therein stated are true, and such as are stated on information or belief are true, as he believes.

EDWARD COLSTON.

Sworn to before me and subscribed in my presence this 11th day of August, 1883.

40c. paid by H., J. & C.

[SEAL.]

JOHN FLACK WINSLOW,
Notary Public, Hamilton County, Ohio.

Circuit Court of the United States, Southern District of Ohio, W. D.

The above is a true and exact copy of the original on file in the clerk's office of the above-named court.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

Attest: B. R. COWEN, *Clerk*,
By R. C. GEORGI, *Deputy*.

52 [Endorsed:] Exhibit No. 1 to bill of review. Case No. 4217. No. 3554. Circuit court of the United States, sixth circuit and southern district of Ohio, western division. The Central Trust Company of New York, a corporation, *vs.* The Toledo, Cincinnati and St. Louis Railroad Company, The Cincinnati Northern railway Company, The Spring Grove, Avondale and Cincinnati Railway, and Grenville D. Braman. In chancery. Bill in equity. Filed August 14th, 1883. Wm. C. Howard, cl'k. Hoadley, Johnson & Colston, Cincinnati, O., counsel for complainants.

53 THE UNITED STATES OF AMERICA, *Southern District of Ohio, Western Division,* } *ss:*

At a stated term of the circuit court of the United States of America within and for the western division of the southern district of Ohio, in the sixth judicial circuit of the United States of America, begun and had in the court-rooms, at the city of Cincinnati, O., in said district, on the first Tuesday of October, being the second day of that month, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States of America the one hundred and eighth—present, the Hon. John Baxter, circuit judge; Hon. Martin Welker, district judge of N. D. of Ohio, and Hon. George R. Sage, district judge of S. D. of Ohio—on Saturday, the twentieth day of October, 1883, among the proceedings had were the following, to wit:

THE CENTRAL TRUST COMPANY OF NEW YORK, a Corporation, Complainant,
vs.
THE TOLEDO, CINCINNATI AND ST. LOUIS RAILROAD Company, The Cincinnati Northern Railway Company, The Spring Grove, Avondale and Cincinnati Railway Company, and Grenville D. Braman, Defendants. } In Chancery.

54 This cause came on to be heard upon the bill of complaint and upon the respective pleas of the Toledo, Cincinnati and St. Louis Railroad Company and of Grenville D. Braman in this cause on the 17th day of September, A. D. 1883.

Upon consideration whereof it is ordered, adjudged, and decreed that each of said pleas is insufficient in law and each of the same is overruled and each of said defendants is given leave to answer to said bill of complaint.

And said cause coming on further to be heard upon the motion of the said The Central Trust Company of New York for the appointment of a receiver of all and singular the premises and property and assets, real and personal, of the said Cincinnati Northern Railroad Company (and of its said leased line described in said bill of complaint as the Spring Grove, Avondale and Cincinnati railway) owned by said Cincinnati Northern Railway Company at the time of its consolidation with the said Toledo, Cincinnati and St. Louis Railroad Company, as averred in said bill of complaint of the said Central Trust Company of New York, upon consideration whereof it is now by Hon. John Baxter, judge of said circuit court, ordered, adjudged, and decreed that William J. Craig be, and he hereby is, appointed receiver herein of all and singular the premises, property, money, and assets owned by the said Cincinnati Northern Railway Company (including said leased line) or to which it was entitled at the time of its said consolidation with said Toledo, Cincinnati and St. Louis Railroad Company, upon his giving bond, with security, to be approved by the Honorable John Baxter, circuit judge, or by the Hon. George R. Sage, sitting in the circuit court in said district, in the penal sum of ten thousand dollars, conditioned for the faithful performance of his duties as such receiver and for obeying all the lawful orders of the court herein, and that as such receiver he is hereby ordered and directed
55 to take possession of, maintain, and operate the said railroad and premises described in the said bill of complaint, being the railroad of the Cincinnati Northern Railway Company, extending from Cincinnati, in Hamilton county, Ohio, to Waynesville, in Warren county, Ohio, and passing through and into the counties of Hamilton, Butler, and Warren, in said State of Ohio, being about forty-two miles in length, constructed and to be constructed; also to take possession of, maintain, and operate as the property of said Cincinnati Northern Railway Company the said leased line described in said bill and known as the Spring Grove, Avondale and Cincinnati railway, extending from a point in the city of Cincinnati, in said Hamilton county, Ohio, south of Court street and west of Broadway, in said city, through the counties of Butler and Hamilton, in said State of Ohio, to the town of Venice, in said Butler county, and to take possession of all the property, real and personal, owned by the said Cincinnati Northern Railway Company or to which it was entitled at the date of its consolidation with the said Toledo, Cincinnati and St. Louis Railroad Company, and the equipment, income, franchises, and appurtenances thereof, as well as lands and other premises and property belonging to said Cincinnati Northern Railway Company at said time, as fully described in said bill of complaint, reference whereto for greater certainty is had and made; and said receiver is hereby clothed with all the authority and rights usually given to a receiver by courts of equity to take charge of, care for, and operate said railroad, including said leased line; to make reports of his acts and doings to this court at least every two months or oftener if required by the court; to collect and receive the tolls, incomes, issues,

rents, and profits of said premises, and out of the same to make
56 such repairs as may be necessary to preserve and keep the same in a safe and proper condition.

And said receiver is hereby authorized to operate said railroad, including said leased line, in connection with any other or others of the constituent roads of the said Toledo, Cincinnati and St. Louis Railroad Company of which he may be appointed receiver, but is hereby directed to keep the accounts of the earnings and expenditures of the said Cincinnati Northern Railway Company separate from the earnings and expenditures of any of the other of the constituent roads of the said Toledo, Cincinnati and St. Louis Railroad Company, except the said Spring Grove, Avondale and Cincinnati Railway Company, and the said defendants, The Cincinnati Northern Railway Company and the Toledo, Cincinnati and St. Louis Railroad Company, are hereby ordered and directed to deliver to the said William J. Craig, receiver, possession and control of all the property, rights, and privileges of every kind belonging to the said Cincinnati Northern Railroad Company and the said Spring Grove, Avondale and Cincinnati Railway Company at the time of the consolidation of said respective companies with the said The Toledo, Cincinnati and St. Louis Railroad Company.

And it is further ordered that said receiver make and file in this court a true inventory of all the cars, engines, rolling stock, material, or supplies belonging to or in possession of said Cincinnati Northern Railway Company at the time of its said consolidation, as well as of all property coming into his possession by virtue of this order.

And said receiver is further ordered to keep the accounts of all through freight and passenger business over said constituent roads, so that the receipts therefrom may be duly apportioned between
57 the same as the court may hereafter direct.

To the judgment of the court overruling the said pleas of said Braman and of said T., C. & St. L. railroad the said Braman and said Toledo, Cincinnati and St. Louis Railroad Company except, and they except to the order of court appointing a receiver.

58 THE UNITED STATES OF AMERICA, }
Southern District of Ohio, Western Division, } *ss:*

I, Benjamin R. Cowen, clerk of the circuit court of the United States within and for the division and district aforesaid, do hereby certify that the foregoing entry is truly taken and correctly copied from the journal of said court.

Seal of the Circuit Court, South'n Dist. of Ohio.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of Cincinnati, O., this 11th day of September, A. D. 1889.

B. R. COWEN, *Clerk*,
By R. C. GEORGI, *Deputy*.

59 [Endorsed:] Exhibit No. 2 to bill of review. Case 4217. No. 3554. Circuit court of the United States, southern dis-

trict of Ohio, western division. Central Trust Co. of N. Y. *vs.* Toledo, Cincinnati and St. Louis R. R. Co. Certified copy of entry. Entered Oct. 20, '83, Journal V., — 162. —— ——, attorneys.

60 UNITED STATES OF AMERICA, } *ss*:
Southern District of Ohio, }

In the Circuit Court of the United States for the Southern District of Ohio.

THE CENTRAL TRUST COMPANY
vs.
GEORGE D. BRAMAN and THE TOLEDO, CINCINNATI AND ST. LOUIS RAILROAD COMPANY. } In Chancery.

To the honorable the judges of said court:

Respectfully shows to your honors R. S. Grant, of the city and State of New York, that heretofore, to wit, on or about March 24th, 1883, your petitioner entered into a certain agreement with the Cincinnati Northern Railway Company, a corporation established under the laws of Ohio, for the lease of ten locomotives and tenders, marked and numbered as follows, viz., 67 to 76, inclusive, made by the Grant Locomotive Works, of Paterson, in the State of New Jersey, which said agreement is hereto annexed and made part hereof.

That subsequently, on or about April 1st, 1883, said Cincinnati Northern Railway Company became consolidated with and merged into the said Toledo, Cincinnati and St. Louis Railroad, a corporation established under the laws of the States of Ohio, Indiana, and Illinois, and by the terms of said consolidation said consolidated railroad company assumed and became responsible for the obligations and covenants of said agreement.

61 And your petitioner further shows that under said agreement of lease he delivered to said Cincinnati Northern Railway Company the ten locomotives and tenders described in said agreement and received in cash from said railway company the sum of $18,558.97 as an instalment of rent, and also on each tenth day of May, June, and July, 1883, the further sums of $1,500, monthly rental, as provided for in said agreement.

And your petitioner further shows that he has kept and performed all the covenants and obligations in said agreement named on his part to be kept and performed, but said consolidated railroad company failed so to do, and has made default in the payments of the $1,500 monthly rental that was due and payable to your petitioner August 10th, September 10th, and October 10th, 1883, respectively, and has also made default in the payment of the half-yearly interest due under said agreement on the first day of October, 1883, amounting to $2,160.00, and said consolidated railroad company still neglects and refuses to make the said payments although requested so to do.

And your petitioner further shows that heretofore, to wit, on the first day of August, 1883, said Toledo, Cincinnati and St. Louis Railroad Company being insolvent and unable to meet its current obligations, E. E. Dwight, Esq., was duly appointed receiver thereof, and said Dwight accepted said trust, and afterwards, under the orders of this court, W. J. Craig, Esq., succeeded to said trust as receiver herein—

All of which appears by the original proceedings in said cause in this honorable court, and said receiver entered into possession of said railroad, and has seized and now retains possession of
62 said ten locomotives and tenders and refuses to surrender the same to your petitioner.

And your petitioner further shows that under said agreement, by reason of said default, your petitioner is entitled to the immediate possession of said ten locomotives and tenders, and, further, that the principle of the $72,000 six per cent. equipment trust bonds, known as "series F," and mentioned in said agreement, is now due and payable, with the half-yearly interest above mentioned, and your petitioner is the sole owner and holder of said bonds.

And your petitioner further shows that the said locomotives and tenders have become greatly deteriorated in value by use on said railroad while in the possession of said receiver, so that, as he is informed and believes, it will require an outlay of at least $10,000 to put them in fair marketable condition; for which sum under the terms of said agreement your petitioner is entitled to reimbursement.

And your petitioner further shows that there is a balance due him on account of the original payment of rental amounting to $638.33, and that the entire amount due to your petitioner on the 20th day of October, 1883, for monthly rentals $4,000.00; half-yearly interest, $2,160.00; repairs, $10,000, and bala ice $638.33, will be the sum of $16,798.33; all of which your petitioner claims is fairly and equitably due from the said receiver and should be paid by him.

Wherefore your petitioner prays that the said receiver may be ordered to pay to your petitioner the said sum of $16,798.33
63 out of any moneys in his hands, and that for the better securing of the payment of the same the said sum may be adjudged by your honors to be a charge upon all the property of said consolidated railroad and especially upon all the property of said Cincinnati Northern Railway Company, as ahead of the first-mortgage bonds secured by the pledge of said property and upon the proceeds arising from the sequestration of the same in this cause or any similar proceedings that may instituted for that purpose.

And your petitioner further prays that the said receiver may be ordered to forthwith surrender said ten locomotives and tenders and further to pay to your petitioner whatever amount may be found to be due after the sale by him of said locomotives and tenders, and the application of the proceeds to the payment of said $72,000, and the interest of said equipment bonds in accordance with the terms of said agreement, and that said amount or balance so found to be due may be adjudged like priority over the said first-mortgage

bonds, as above prayed for in the matter of rental, interest, and repairs.

And four such other and further relief as to your honors may seem meet.

— m- the — -ver —, &c.

WILSON AND JONES,
Solicitors for Petitioner.

— OF AMERICA, }
— *of Ohio.* }

-luford Wilson, being duly sworn, says that he is one of the solicitors for — -tioners in the above cause and is familiar with
64 the matters — stated in said petition, and that the same are true, — stated on information and belief, and these he — true.

BLUFORD WILSON.

— before me and subscribed in my presence the 27th day of October, A. D. 1883.

[SEAL.]

ROB'T C. GEORGI,
Dept. Cl'k U. S. C. C., S. D. O.

THE UNITED STATES OF AMERICA, }
Southern Dist. of Ohio, } *ss:*

A true and correct copy of the original on file in the clerk's office of the circuit court of the United States within and for district aforesaid.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

Attest:

B. R. COWEN, *Clerk,*
By R. C. GEORGI, *Deputy.*

65 [Endorsed:] Exhibit No. 3 to bill of review. Case 4217. No. 3554. United States of America, southern district of Ohio. The Central Trust Company *vs.* George D. Braman and The Toledo, Cincinnati and St. Louis R. R. Co. Intervening petition of R. Suydam Grant. Filed Oct. 27th, 1883. Wm. C. Howard, cl'k. Wilson & Jones, pet'r's sol'c's

66 Circuit Court of the United States, Southern District of Ohio.
In Chancery.

THE CENTRAL TRUST COMPANY OF NEW YORK, a Corporation,
against
THE TOLEDO AND ST. LOUIS RAILROAD COMPANY, THE Cincinnati Northern Railway Company, and Others. } No. 3554.

To the judges of the circuit court of the United States for the southern district of Ohio:

The Central Trust Company of New York, a corporation under the

laws of said State, showeth unto your honors that it is the complainant in this cause, wherein, on the 14th day of August, 1883, it filed its certain bill of complaint against the Toledo, Cincinnati and St. Louis Railroad Company, The Cincinnati Northern Railroad Company, and others, defendants, praying for the foreclosure of a certain mortgage, known as the first mortgage, upon the railroad and property of the said Cincinnati Northern Railroad Company, wherein it was mortgagee, which mortgage was made on the first day of October, 1880, by said railway company to said complainant to secure one thousand bonds of the said last-named railway company, of even date with said mortgage, with interest thereon at the rate of six per cent. per annum, payable semi-annually, which said mortgage is the first and best lien on said property of said railway company, and further praying for a sale of the mortgaged premises and for
67 the appointment of a receiver to operate said railway, all of which will more fully appear by said bill of complaint herein filed, for which purpose reference is now had thereto.

And your petitioner further showeth that on the 20th day of October, 1883, one William J. Craig was by this court appointed receiver of all the railroad and property of said Cincinnati Northern Railway Company included within said mortgage, and that the said Craig duly qualified as such receiver in pursuance of said appointment, and ever since has been and now is in possession of said property, operating the same as such receiver.

And your petitioner further showeth that on the 27th day of October, A. D. 1883, one R. Suydam Grant, by leave of this court, filed in this court in this cause a certain application or intervening petition, setting forth that on or about the 24th day of March, 1883, the said Grant had made and entered into a certain arrangement or contract with the said Cincinnati Northern Railway Company, by which he agreed to furnish, on the terms set forth therein and the exhibits to the same attached and on file in this cause, certain rolling stock, to wit, ten locomotives and tenders, marked and numbered from 67 to 76, inclusive, made by the Grant Locomotive Works, Paterson, N. J., and further setting forth that said rolling stock had been delivered to and received by said Cincinnati Northern Railway Company, and that partial payments had been made therefor on account of the said contract price of said rolling stock and also on account of the agreed rent for the use thereof by said Cincinnati Northern Railway Company, and for greater certainty as to the allegations
68 of the said Grant in said petition in respect to the alleged sale and lease of said rolling stock to said Cincinnati Northern Railway Company and of the delivery of the same to it and of payments to him by it on account thereof, as well for the price thereof as for rent, reference is now made to the intervening petition of the said Grant and exhibits to the same, now on file in this cause.

And your petitioner further showeth to your honors that afterwards, on the 22nd day of December, 1883, the said Grant procured to be made in this cause, upon said intervening petition, a certain entry or order purporting to find that the said William J. Craig, as receiver of the Cincinnati Northern Railway Company, had in his

possession one of the locomotives mentioned in said petition of said Grant, to wit, locomotive No. 73, and was using the same in the operation of the said Cincinnati Northern railway between Cincinnati, Ohio, and Dayton, Ohio, and that the said locomotive was acquired by said Cincinnati Northern Railway Company under the terms of said alleged agreement, and was so held at the time of the appointment of said receiver herein; and further purporting to find that the said William J. Craig or his predecessor had taken said locomotive, with its tender, into his possession on the first day of August, 1883, and had used the same since that date without any compensation therefor; and further purporting to find that said locomotive was, in the judgment of said receiver, necessary to the proper operation of said Cincinnati Northern railway and should be acquired as part of its permanent equipment, and that the value of
69 said locomotive fixed by said agreement of lease was reasonable, and that the said Grant was the owner thereof, and was willing upon the receipt of the contract price or upon being adequately secured therein to transfer the title therein to the receiver, and purporting to adjudge and decree, after an alleged full hearing and upon an alleged due inquiry, that said receiver pay to said Grant as rent for said locomotive and tender the sum of seven hundred and seventy dollars and forty-eight cents, and the further sum of seven thousand five hundred and twenty dollars, the balance in full of purchase-money for said locomotive and tender; and further purporting to adjudge and decree that said receiver pay said several amounts to said Grant, as part of the operating expense of said railway, out of any money not appropriated for the payment of current labor, supplies, and taxes; and purporting further to adjudge and decree that said several amounts, with interest at the rate of six per cent. from the first day of December, 1883, should be a charge upon the earnings, income, and all the property of the said Toledo, Cincinnati and St. Louis Railway Company, and especially of the said Cincinnati Northern Railway Company, ahead of "the first mortgage or other bonded debt of said company or either of them, and that any balance of said amounts remaining at the date of the foreclosure and sale of said Cincinnati Northern railway shall be a first lien thereon, and the said sale should be made subject thereto.

And your petitioner further showeth that the said R. S. Grant, under said intervening petition hereinbefore mentioned, procured to be made, without the knowledge or consent of the com-
70 plainant herein and under circumstances exactly similar to those attending the procurement of the order hereinbefore last mentioned, a certain other order or decree in this case on said 22nd day of December, 1883, at the same time that the order last hereinbefore mentioned was made; which said second order purported to find that some person, denominated in said order as "the receiver," had in his possession Grant locomotives numbered 67, 68, and 72, with their tenders, being part of those mentioned in said intervening petition; and said order further purporting to find that said person so denominated "receiver" was using the same in the operation of something termed in said order "the said Southeastern

Division of the said defendant company's railroad between Dayton and Wellston, Ohio," and that said locomotives 67, 68, and 72, with their tenders, were acquired by "said railway company" under the terms of said alleged agreement mentioned in the intervening petition of said R. S. Grant, and were so held at the date of the appointment of the "receiver" in this cause; and said order further purporting to find that the present receiver, not naming him, or his predecessor, took said locomotives into his possession as such receiver on the first day of August last, and has had the same in continuous use and possession since that day; and further purporting to find that said locomotives are, in the judgement of "the receiver," necessary to the proper operation of the said "railway," and should be acquired as part "of its permanent equipment," and, in short, purporting to find the value of said locomotives and tenders as fixed in said pretended agreement of lease reasonable, and finding
71 the balance due on account thereof, twenty-two thousand five hundred and sixty dollars, and the balance due on account of rent thereof, two thousand three hundred and eleven dollars and forty-one cents, and finding that said Grant was willing to transfer the title of said engines and tenders upon payment of said sums, of which willingness your petitioner has no doubt; and further purporting to order "the receiver" to pay said several amounts as part of the operating expenses "of the said Southeastern Division" out of any money not appropriated for payment of current labor, supplies, and taxes; and said decree further purported to direct that said several sums, with interest at six per cent. from the first day of December last, be a charge upon the earnings, income, and all the property of the said Toledo, Cincinnati and St. Louis Railroad Company, and especially "of the said division," prior to the first mortgage or other bonded debt of said railroad or said division thereof, and that any balance of said several amounts remaining unpaid at the date of the foreclosure and sale of said railroad or said division should be a first lien thereon and the said sale should be made subject thereto.

And your petitioner further showeth unto your honors that no order or process of any sort was made or issued against it requiring the allegations of said petition to be answered by the complainant in said cause, as should have been done, and that it had no notice whatever of any application for the making of either of said orders as aforesaid, upon the intervening petition of the said Grant, and that if it had had notice of either of said orders before the
72 same were made it would have resisted the making thereof, and that it had no notice that said orders had been made in this cause upon the petition of said Grant in this cause until the fact thereof was stated, on the 26th day of February, 1884, to the judges of the circuit court of the United States for the sixth and seventh circuits, sitting at the city of Indianapolis, Indiana, by the counsel who obtained said orders, and thereupon notice was immediately given to said counsel of the intention of the complainant in this cause to apply for the setting aside of said orders, and upon the application of the complainant herein, in pursuance thereof, orders

were made in this cause by this court on the 7th instant suspending said orders until the further action of the court in that behalf.

And your petitioner further showeth unto your honors that said orders upon the intervening petition of said Grant in this cause were entered by this court by inadvertence and from misapprehension, the court acting in that behalf upon the belief that the making of said orders had been assented to by your petitioner, who is the complainant in this cause, but your petitioner says that it never did assent to the entering of said orders and had no knowledge whatever that the same were proposed to be entered.

And your petitioner further showeth that said orders were entered without any hearing and without any legal or competent evidence whatever to support the findings therein purporting to be made or the allegation of the intervening petition of the said Grant, and the finding in said orders that the present receiver, William

73 J. Craig, or his predecessor had been in possession of said locomotives since the first of August last, and using the same in the operation of the said Cincinnati Northern Railway Company between Cincinnati, Ohio, and Dayton, Ohio, or in the operation of the "said Southeastern Division of the said defendants company's railroad between Dayton and Wellston, Ohio," is not only untrue, but is impossible, because your petitioner says that William J. Craig was not appointed receiver of said Cincinnati Northern railway or of said railroad mentioned in said second order until the 20th day of October, 1883, which latter appointment was made not in this cause, but in another cause, in which your petitioner is also complainant, seeking, as mortgagee, to foreclose the first mortgage thereon made by the Toledo, Delphos and Burlington railroad, which owned the same at the time of the execution of said mortgage, and that he had no predecessor whatever as such receiver; and the said Cincinnati Northern railway has never at any time extended from Cincinnati to Dayton, Ohio, but only from Cincinnati to a point called Dodds, in Warren county, Ohio, which is twenty-five or thirty miles south of Dayton.

And your petitioner further represents that the said Craig was never in this case appointed receiver of what is described in the second of said orders as "the said Southeastern Division of said defendant company's railroad between Dayton and Wellston, Ohio," and that the railroad intended to be describod thereby is an entirely distinct and separate railroad from the Cincinnati Northern railroad.

74 And your petitioner further showeth that all the allegations of the said petition of the said Grant, so far as the same seek to affect the Cincinnati Northern Railway Company or the railroad described in said second order as "the said Southeastern Division of the said defendant company's railroad between Dayton and Wellston, Ohio," are untrue in fact, and that it has no knowledge as to whether said alleged contract between the said Grant and the Cincinnati Northern railway of the sale or lease of said rolling stock mentioned in the said intervening petition of the said Grant was in fact made, and therefore denies the same, but further showeth

that if said contract was so made it was made after the consolidation of the Cincinnati Northern Railway Company with the Toledo, Cincinnati and St. Louis Railroad Company had been agreed upon by said respective companies and by the same persons who were officers at the time of the said Toledo, Cincinnati and St. Louis Railroad Company and without the knowledge and consent of this complainant, and that said rolling stock was not contracted for for the benefit or use of the said Cincinnati Northern Railway Company, but for the use of the said Toledo, Cincinnati and St. Louis Railroad Company on portions of its road in the States of Illinois and Indiana, and the name of the Cincinnati Northern Railway Company was used for the purpose of buying said rolling stock for said Toledo, Cincinnati and St. Louis Railroad Company as a mere cover for said transaction, and that said rolling stock was not at the
75 date of said alleged contract needed by said Cincinnati Northern Railway Company for the operation of its said road, and the same is not now and has never since then been needed therefor; that at the time the receiver was appointed in this case the said Cincinnati Northern Railway Company had and now has sufficient rolling stock to operate said road, and that the said Cincinnati Northern Railway Company never received any of the locomotives mentioned in said intervening petition of said Grant and never paid anything on account thereof, either as rent or otherwise.

And your petitioner further showeth that the prices for said locotives and also the rental thereof set forth in the intervening petition of the said Grant and ex-ibits thereto attached are extravagant, excessive, and far above the true value of said locomotives, either at the date of said alleged contract or at the time of entering said orders or at the present time.

And your petitioner further showeth, in further denial of the allegations of said intervening petition of said Grant, that it has no knowledge or information as to default in the payment of the monthly rental for said rolling stock by the said consolidated railroad company mentioned in said intervening petition, and therefore fore denies the same, and that it is not true that the said W. J. Craig was by this court appointed to succeed the said E. E. Dwight as receiver of the said Toledo, Cincinnati and St. Louis Railroad Company, and it is not true that any such thing will appear by
76 the records of this court; that it is not true that the said Craig, as receiver in this cause, has seized or taken possession of any of the rolling stock mentioned in said petition.

And your petitioner further shows that it has no knowledge whether or not said Grant be entitled under said alleged agreement to take possession of said rolling stock mentioned in said intervening petition, and therefore denies the same; but it further says that if he be so entitled to take possession it has no objection to his doing so; and, further, it has no knowledge or information as to whether said six per cent. equipment trust bonds mentioned in said petition are due or payable or whether said Grant is the owner or holder of any of the same, and therefore denies all allegations in said intervening petition relative thereto; and your petitioner fur-

ther says that it has no knowledge or information as to whether said rolling stock has become deteriorated in value by use while in possession of said Craig, and therefore denies that it has been so deteriorated or that it has been used by said Craig as such receiver, and denies that said Grant is entitled to any reimbursement for any such alleged deterioration. As to whether there is any balance due said Grant on account of said alleged rental of said rolling stock mentioned in said intervening petition, your petitioner says it is ignorant, and therefore denies the same, and that it is likewise ignoront as to whether there is anything due said petitioner on account of monthly rentals, half-yearly interest, repairs, or otherwise for said rolling stock, and therefore denies the same.

77 And your petitioner further showeth that the said Grant has no claim at law or in equity for the relief or any part thereof asked for in said intervening petition and granted in said orders as against said Cincinnati Northern Railway Company or said Toledo, Delphos and Burlington Railway Company, which your petitioner supposes is the railroad referred to in said second order as "the Southeastern Division of the said defendant company's railroad." Your petitioner showeth that no interest has been paid out of earnings of either of said roads on 1st-mortgage bonds.

Wherefore your petitioner prays that this petition may be taken as well for an answer to the said intervening petition of R. Suydam Grant as for a petitionf or rehearing or review of said intervening petition and of the orders so as aforesaid erroneously and inadvertently made thereunder; and your petitioner further prays that the said orders may be annulled, set aside, and held for naught; that the said R. Suydam Grant may be decreed to pay to your petitioner its reasonable costs and expenses in this behalf incurred, and that it (your petitioner) may be decreed to have such other and further relief as shall be in conformity to the course of equity and to good conscience.

HOADLY, JOHNSON AND COLSTON,
Solicitors for Complainant.

UNITED STATES OF AMERICA, *Southern District of Ohio,* } *ss:*

Edward Colston, being by me first duly sworn, says that he is one of the solicitors of The Central Trust Company of New York,

78 the complainant in this cause, and that he has read the foregoing petition and is familiar with the contents thereof, and that the matters and things therein stated are true, except where stated on information and belief, and those he believes to be true.

EDWARD COLSTON.

Sworn to before me and subscribed in my presence March 13th, 1884.

[SEAL.] JNO. T. JOCKEL,
Notary Public, Hamilton County, Ohio.

40c., paid by H., J. & C.

CIRCUIT COURT OF THE UNITED STATES, *Southern District of Ohio, W. D.*, } *ss*:

The above is a true and exact copy of the original on file in the clerk's office of above-named court.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

Attest: B. R. COWEN, *Clerk*,
By R. C. GEORGI, *Deputy*.

79 [Endorsed:] Exhibit No. 4 to bill of review. Case 4217. No. 3554. United States circuit court, southern district of Ohio, western division. The Central Trust Co. of New York, plaintiff, *vs.* The Toledo, Cincinnati and St. Louis R. W. Co. *et al.*, defendants. Petition of Central Trust Co. for rehearing, etc. Filed March 15th, 1884. W. C. Howard, clerk. Hoadly, Johnson & Colston, attorneys for complainants.

80 THE UNITED STATES OF AMERICA, *Southern District of Ohio, Western Division*, } *ss*:

At a stated term of the circuit court of the United States of America within and for the western division of the southern district of Ohio, in the sixth judicial circuit of the United States of America, begun and had in the court-rooms, at the city of Cincinnati, O., in said district, on the first Tuesday of April, being the first day of that month, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States of America the one hundred and eighth—present, the Hon. John Baxter, circuit judge, and the Hon. George R. Sage, district judge—on Thursday, the tenth day of April, 1884, among the proceedings had were the following, to wit:

THE CENTRAL TRUST COMPANY OF NEW YORK
against
TOLEDO, CINCINNATI AND ST. LOUIS RAILROAD COMPANY, The Cincinnati Northern Railway Company, and Others. } In Chancery. No. 3554.

This day this cause came on further to be heard upon the intervening petition of R. Suydam Grant, filed in this cause October 27th, 1883, and the court, being fully advised in the premises, does order, adjudge, and decree as follows, to wit:

81 The court finds that the two decrees herein made and entered upon said intervening petition on the 22d day of December, A. D. 1883, were entered without notice to the complainant herein and without proof; that the said decrees are erroneous and unjust to the bondholders for whom the said complainant herein is trustee; that said decrees are not authorized by the pleadings and are based upon a misrecital of the facts as evidenced by the record in this cause; that said decrees were authorized by the court without examination in the erroneous belief entertained at the time that all the parties in interest

had ascented to said decrees, and that the parties adversely interested acquired no knowledge of the allowance of said decrees until about the 24th day of February, A. D. 1884, and after the adjournment of the term of court at which the same were entered.

And thereupon it is by the court of its own motion ordered, adjudged, and decreed that the said decrees be, and they are hereby, annulled, set aside, and held for naught.

And the court, coming now to determine the questions arrising upon the said intervening petition of R. Suydam Grant, does order, adjudge, and decree as follows, to wit:

That the relief prayed for in said intervening petition be, and it is hereby, denied except as hereinafter provided.

And the court does further find that the said petitioner is entitled to fair compensation for the use of said rolling stock described in his said intervening petition by the receiver in this cause upon the railroad of The Cincinnati Northern Railway Company, defendant herein, and for any deterioration by reason of such use;

82 but the court defers the determination of the amount of such compensation until the coming in of the report thereon of the master appointed in this cause on the fifth day of April, A. D. 1884.

And the court does further find that the said petitioner is entitled to take and repossess himself of his said rolling stock wherever the same may be found in the possession of the receiver appointed in this cause or of the receiver appointed in causes numbered 3576, 3577, 3578, and 3579 in this court; and leave is hereby granted to said petitioner to apply at any time to this court for any additional orders that may be necessary in that behalf.

And the said R. Suydam Grant applied for leave to answer the petition of the complainant, The Central Trust Company, filed March 15th, 1884, and to support his answer by affidavits or other proof, and the court, entertaining the opinion that the answer and affidavits proposed are by force of the foregoing decree rendered unnecessary, declines to grant the leave asked and refused to permit an answer to said petition for rehearing on affidavits or other proof in support thereof to be filed; and thereupon the intervening petitioner, R. Suydam Grant, in open court prayed an appeal from the foregoing decree, which is disallowed by the court.

83 THE UNITED STATES OF AMERICA, }
Southern District of Ohio, Western Division, } *ss:*

I, Benjamin R. Cowen, clerk of the circuit court of the United States within and for the division and district aforesaid, do hereby certify that the foregoing entry is truly taken and correctly copied from the journal of said court.

Seal of the Circuit Court, South'n Dist. of Ohio.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of Cincinnati, O., this tenth day of August, A. D. 1889.

B. R. COWEN, *Clerk,*
By R. C. GEORGI, *Deputy.*

84 [Endorsed:] Exhibit No. 5 to bill of review. Case 4217. No. 3554. Circuit court of the United States, southern district of Ohio, western division. Central Trust Co. of New York *vs.* Toledo, Cincinnati and St. Louis R'y Co. and others. Certified copy of entry. Entered April 10, '84. W. C. Howard, clerk. Journal V, 362. —— ——, attorneys.

85 UNITED STATES OF AMERICA, *Southern District of Ohio, Western Division,* } *ss:*

At a stated term of the circuit court of the United States of America within and for the western division of the southern district of Ohio, in the sixth judicial circuit of the United States of America, begun and had in the court-rooms, at the city of Cincinnati, Ohio, in the said district, on the first Tuesday of October, being the second day of that month, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States of America the one hundred and thirteenth—present, the Hon. Howell E. Jackson, circuit judge—on Monday, the 28 day of January, 1889, among the proceedings had were the following, to wit:

THE CENTRAL TRUST COMPANY OF NEW YORK, Complainant,
vs.
THE TOLEDO, CINCINNATI AND ST. LOUIS Railroad Company, The Cincinnati Northern Railway Company, *et al.*, Respondents. } In Chancery. No. 3554.

86 In the matter of the intervening petition of R. S. Grant.

This cause coming on to be further heard on the motion of said intervening petitioner, by his counsel, B. H. Bristow and Bluford Wilson, to require the purchasers of the railroad property heretofore sold under decree of foreclosure and sale in this case to forthwith pay into the registry of this court, for the use of the said intervenor, the amount due under the said decree entered herein December 22, 1883, with interest, according to the terms thereof, and that in default thereof the said railroad property be resold for the benefit of the intervenor;

And the said intervenor being present by his counsel, and the purchasers of the Dayton and of the Cincinnati Divisions being represented by C. W. Fairbanks, their solicitor, and the Cincinnati, Lebanon and Northern Railway Company, assignee of purchasers at the foreclosure sale of the Cincinnati Northern Railway, by William M. Ramsey, its solicitor, and the Dayton, Fort Wayne & Chicago Railroad Company, assignee of the purchasers of the Southeastern Division and of the purchasers of the Iron railroad, by John C. Coombs, its solicitor, and R. D. Marshall, the present receiver of the said railroad company, and the purchasers of the main line, the Toledo Terminal, and the St. Louis Division being present by Clarence Brown, their solicitor, objecting to the jurisdiction of the court, and

the complainant, The Central Trust Company of New York, being represented by Edward Colston, their solicitor, opposing said motion of the said intervenor;

And thereupon, pending the hearing upon the said motion, comes the complainant, The Central Trust Company of New York, and asks the court that the petition filed herein in its behalf on the 15th day of March, 1884, be now heard as a petition for a rehearing of the said decrees of December 22nd, 1883, or if that relief be denied that the same be taken and held to be a bill of review or a bill in the nature of a bill of review, or if that relief be denied that the said petition be amended and supplemented in certain respects, as stated in a certain paper now read, and be now docketed as
87 & 88 an original bill of review as of the 15th day of March, 1884; and, after hearing Edward Colston, the counsel for said complainant, in support of the said motion and B. H. Bristow and Bluford Wilson, of counsel for the said intervening petitioner, in opposition thereto, it is ordered that the said application of the complainant, and each part thereof, be, and the same is, denied in all respects.

To which ruling and order of the court the said complainant duly excepts.

89 And thereupon, the court having fully heard the argument of counsel of the respective parties hereto upon the said motion of the said intervening petitioner, R. S. Grant, as first above stated, and having fully deliberated thereon, and the court considering that the order entered herein on the 10th day of April, 1884, was void, and that it had been for that reason set aside and ordered to be held for naught by the order entered herein on June 11th, 1887, and that all the orders or decrees entered herein in pursuance of or in execution of the said order of April 10th, 1884, were equally void and of no effect so far as the same purport to affect the rights of the said intervenor, and that the decrees entered herein on December 22, 1883, are now in full force and effect as to the locomotives hereinafter mentioned;

And the court further considering that under the said decrees of Dec. 22, 1883, and under said decree of foreclosure and sale herein and the notice of sale given in pursuance of such decree, and under the sale actually made thereunder and the order of this court confirming the said sale, the purchasers of the mortgage division of said Toledo, Cincinnati & St. Louis R. R. sold in this case took the said railway and property subject to the payment of the sum of $8,290.48, with interest thereon from the first day of December, 1883, adjudged by the said decree of December 22, 1883, in respect thereto, to be due to the intervenor, R. S. Grant, on account of locomotive No. seventy-three (73), and by the said decrees ordered to be paid by W. J. Craig, the receiver, in the manner set forth in said decree of Dec. 22nd, 1883, to the said intervenor, and also adjudged by the said decree to be a first lien upon the Toledo, Cincinnati & St. Louis railroad, and especially upon the Cincinnati Northern Division thereof;

And the court further considering that the said lien adjudged by

the said decree of Dec. 22nd, 1883, in favor of the said inter-
90 venor, R. S. Grant, against the said railroad should now be enforced, and also that there should now be enforced the right reserved by this court upon the sale of the Cincinnati Northern Division of the said Toledo, Cincinnati & St. Louis railroad to resell the premises and property so sold in this case upon failure to comply within twenty days with any order of this court directing the purchasers thereof to make such further payment in this case as this court should from time to time direct in order to meet claims adjudged in this case by this court to be prior in equity to the mortgages foreclosed in this case;

And the said intervenor admitting he had already received upon account for the said locomotive No. seventy-three (73), but without prejudice to his rights in the premises, the following sums of money, viz., the amount of $183.36, paid between November, 1885, and February, 1886, on account of rentals, and the amount of $3,000, paid September 2d, 1887, upon the sale of the said locomotive No 73 to the Havana, Rantoul and Eastern Railway Company, and that after crediting the amounts so admitted to have been paid, and after adjusting the interest and expense accounts up to the 12th day of November, 1888, the net amount remaining due and unpaid to the said intervenor on account of the said locomotive No. seventy-three (73), on this 12th day of November, 1888, is the sum of sixty-nine hundred and ninety-five $\frac{75}{100}$ dollars ($6,995.75), and no more, and no one claiming that any other or greater credit should be made upon the said claim:

91 Thereupon the court orders as follows:

It is now ordered that the purchasers of the Cincinnati Northern Division, or their said assignee, the Cincinnati, Lebanon & Northern Railway Company, of the said Toledo, Cincinnati & St. Louis railroad, as being primarily chargeable therewith as between themselves and the said intervenor under the said decree of Dec. 22nd, 1883, be and they are required to pay or cause to be paid into the registry of this court within sixty days from the 28 day of January, 1889, for the use of the said intervenor, R. S. Grant, the amount of sixty-nine hundred and ninety-five $\frac{75}{100}$ dollars ($6,995.75), with interest thereon from the 12th day of November, 1888.

And it is further ordered that in default of making of the said payment within the time so limited therefor the said Cincinnati Northern Division be resold upon request of the said intervenor herein, R. S. Grant, for the payment and satisfaction out of the proceeds thereof of the said sum of $6,995.75, with interest, herein directed to be paid to the said intervenor by the said purchasers.

And it is further ordered that this decree is without prejudice to any right the said intervenor may have to apply for orders to resell other mortgage divisions of the Toledo, Cincinnati and St. Louis railroad for the payment out of proceeds of such resale any balance of the amount hereinbefore named, to wit, said sum of $6,995.75, not realized upon any sale of the Cincinnati Northern Division.

And it is further ordered that in case any resale of the railroad and property hereinbefore described in this case becomes necessary by reason of default in the payment of said amount hereby ordered to be paid, then such resale shall be made pursuant to the terms of the original decrees for the foreclosure and sale of the said railroads respectively, but by the marshal of this district, who is hereby appointed master commissioner for that purpose, and that leave
92 is given to apply to this court for further directions as to any such sale.

And it is further ordered that this order is and shall be without prejudice to the right of the said Cincinnati Northern Division and the purchasers thereof or any other persons or corporation succeeding to or having their rights in the premises to apply to this and other courts having jurisdiction in the several cases in foreclosure proceedings against the several divisions of the said Toledo, Cincinnati & St. Louis railroad for contribution towards the said amount from said several divisions or the said purchases thereof, or in the event of the payment of the same by said purchasers of said Cincinnati Northern Division to apply for a distribution thereof over and among said other divisions according to the percentage of contribution and distribution applicable thereto as herein and in said other causes of foreclosure has been or may be determined, or to collect or enforce the payment of said sum by the said Toledo, Cincinnati & St. Louis Railroad Company or out of and against any property thereof, all as the rights not now passed upon but expressly reserved as to such contribution of the said parties purchasers of said respective mortgage divisions and said Toledo, Cincinnati and St. Louis Railroad Company as between each other shall appear and as this court and any other court having jurisdiction in or touching the premises heretofore may have determined or shall order, adjudge, and decree.

And thereupon the said Central Trust Company of New York prays an appeal to the Supreme Court of the United States from the orders so made, and the said Central Trust Company also prays an appeal to the Supreme Court of the United States from the said rulings hereinbefore mentioned, to which it excepted
93 as aforesaid, which exceptions are allowed, and this court allows both of the appeals so prayed upon the said appellants filing a bond herein, with sufficient security, to be approved by this court, in the sum of five thousand dollars, which appeal shall during the pendency and until the determination thereof supersede this decree and all enforcements thereof by or on behalf of the said intervenor.

THE UNITED STATES OF AMERICA,
Southern Dist. of Ohio, Western Division, } *ss:*

I, B. R. Cowen, clerk U. S. circuit court within and for the division and district aforesaid, do hereby certify that the foregoing entry is truly taken and correctly copied from the journal of said court.

Seal of the Circuit Court, South'n Dist. of Ohio.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at the city of Cincinnati, O., this 11th day of September, A. D. 1889.

B. R. COWEN, *Clerk*,
By R. C. GEORGI, *Deputy*.

94 [Endorsed:] Exhibit No. 6 to bill of review. Case 4217 Copy. No. 3554. U. S. circuit court, southern district of Ohio, western division. Central Trust Co. of New York *vs.* Toledo, Cincinnati & St. Louis R. R. Co. *et al.* Order for resale of Cincinnati Northern Division upon decree in favor of the intervenor, R. S Grant. Locomotive 73. Entered Jan'y 28, '89, Journal Y, 178

95 UNITED STATES OF AMERICA, *Southern District of Ohio, Western Division,* } *ss:*

At a stated term of the circuit court of the United States of America within and for the western division of the southern district of Ohio, in the sixth judicial circuit of the United States of America, begun and had in the court-rooms, at the city of Cincinnati, Ohio, in the said district, on the first Tuesday of October, being the second day of that month, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States of America the one hundred and thirteenth—present, the Hon. Howell E. Jackson, circuit judge—on Monday, the 28 day of January, 1889, among the proceedings had were the following, to wit:

THE CENTRAL TRUST COMPANY OF NEW YORK, Complainant,
vs.
THE TOLEDO, CINCINNATI AND ST. LOUIS RAILROAD Company (Dayton and Southeastern Division) *et al.*, Respondents.
} In Chancery. No. 3554.

96 In the matter of the intervening petition of R. S. Grant.

This cause coming on to be further heard on the motion of said intervening petitioner, by his counsel, B. H. Bristow and Bluford Wilson, to require the purchasers of the railroad property heretofore sold under decree of foreclosure and sale in this case to forthwith pay into the registry of this court for the use of the said intervenor the amount due under decree entered herein December 22, 1883, with interest, according to the terms thereof, and that in default thereof the said railroad property be resold for the benefit of the intervenors;

And the said intervenor being present by his counsel, and the purchasers of the Dayton and of the Cincinnati Divisions being present by C. W. Fairbanks, their solicitor, and the Cincinnati, Lebanon & Northern Railway Company, assignee of the purchasers at the foreclosure sale of the Cincinnati Northern Railway, by William M. Ramsey, its solicitor, and the Dayton, Fort Wayne & Chi-

cago Railroad Company, assignee of the purchasers of the Southeastern Division and of the purchasers of the Iron railroad, by John C. Coombs, its solicitor, and R. D. Marshall, the present receiver of the said railroad company, and the purchasers of the main line, the Toledo Terminal, and the St. Louis Division being present by Clarence Brown, their solicitor, objecting to the jurisdiction of the court, and the complainant, The Central Trust Company of New York, opposing said motion of the said intervenor, being represented by Edward Colston, its solicitor;

And thereupon, pending the hearing upon the said motion, comes the complainant, The Central Trust Company of New York, and asks the court that the petition filed herein in its behalf on the 15th day of March, 1884, be now heard as a petition for a rehearing of the said decrees of December 22nd, 1883, or, if that relief be denied, that the same be taken and held to be a bill of review or a bill in the nature of a bill of review, or, if that relief be denied, that the said petition be amended and supplemented in certain respects, as stated in a certain paper now read, and be now docketed as

97 an original bill of review as of the 15th day of March, 1884; and, after hearing Edward Colston, the counsel for said complainant, in support of the said motion, and B. H. Bristow and Bluford Wilson, of counsel for the said intervening petitioner, in opposition thereto, it is ordered that the said application of the complainant and each part thereof be, and the same is, denied in all respects.

To which ruling and order of the court the said complainant duly excepts.

98 And thereupon, and still pending the hearing upon the motion first before stated, comes the Dayton, Fort Wayne and Chicago Railroad Company, by John C. Coombs, its counsel, and R. D. Marshall, its present receiver, the said railroad company claiming to be the assignee of the purchasers of the Southeastern Division, which railroad was sold under the decree of foreclosure and sale herein, and prays leave to be permitted to intervene herein and be heard herein in review upon the matters of the original orders or decrees entered herein on December 22nd, 1883, and as set forth in a petition in writing therefor, which it moved the court for leave to file herein; and, after hearing the counsel for said Dayton, Fort Wayne and Chicago Railroad Company in support of said motion and B. H. Bristow and Bluford Wilson, of counsel for the said intervening petitioner, in opposition thereto, it is ordered that the application of the said Dayton, Fort Wayne and Chicago Railroad Company for leave to intervene and to file said petition herein be, and the same is, in all respects denied.

To which ruling and order of the court the said Dayton, Fort Wayne and Chicago Railroad Company and its receiver duly except.

99 And thereupon, the court having fully heard the argument of counsel of the respective parties hereto upon the said motion of the said intervening petitioner, R. S. Grant, as first above stated, and having fully deliberated thereon, and the court

considering that the order entered herein on the 10th day of April, 1884, was void, and that it had been for that reason set aside and ordered to be held for naught by the order entered herein on June 11th, 1887, and that all the orders or decrees entered herein in pursuance of or in execution of the said order of April 10th, 1884, were equally void and of no effect so far as the same purport to affect the rights of the said intervenor, and that the decrees entered herein on December 22, 1883, are now in full force and effect as to the locomotives hereinafter mentioned;

And the court further considering that under the said decrees of Dec. 22, 1883, and under said decree of foreclosure and sale herein and the notice of sale given in pursuance of such decree, and under the sale actually made thereunder and the order of this court confirming the said sale, the purchasers of the mortgage division of said Toledo, Cincinnati & St. Louis R. R. sold in this case took the said railway and property subject to the payment of the sum of $24,871.41, with interest thereon from the first day of December, 1883, adjudged by the said decree of December 22, 1883, in respect thereto to be due to the intervenor, R. S. Grant, on account of locomotives Nos. 67, 68, and 72, and by the said decree ordered to be paid by W. J. Craig, the receiver, in the manner set forth in said decree of Dec. 22nd, 1883, to the said intervenor, and also adjudged by the said decree to be a first lien upon the Toledo, Cincinnati and St. Louis railroad, and especially on the Southeastern Division thereof;

And the court further considering that the said lien adjudged by the said decree of Dec. 22nd, 1883, in favor of the said intervenor, R. S. Grant, against the said railroad should now be enforced, and also that there should now be enforced the right reserved by this court upon the sale of the Southeastern Division of the said Toledo, Cincinnati & St. Louis railroad to resell the premises and property so sold in this case upon failure to comply within twenty days with any order of this court directing the purchasers thereof to make such further payment in this case as this court should from time to time direct in order to meet claims adjudged in this case by this court to be prior in equity to the mortgages foreclosed in this case;

And the said intervenor admitting he had already received upon account for the said locomotives Nos. 67, 68, and 72, but without prejudice to his rights in the premises, the following sums of money, viz., the amount of $3,600, paid December 15th, 1885, upon the sale of locomotive No. 72 to the Florida Commercial Comp'y, and that after crediting the amounts so admitted to have been paid, and after adjusting the interest and expenses accounts up to the 12th day of November, 1888, said expense being $1,058.72 for care and repairs of said engines by the intervenor from March, 1885, to August 6, 1866, the net amount remaining due and unpaid to the said intervenor on account of the said locomotives Nos. 67, 68, and 72 on this 12th day of November, 1888, is the sum of $29,083.96, and no more, and no one claiming that any other or greater credit should be made upon the said claim;

And as to said locomotives 67 and 68 being in custody of said R. S. Grant for care thereof, said Grant is authorized to sell the same within the next sixty days after giving to all parties twenty days' written notice of time and place of sale, and after publication of two days' prior notice of the same in a daily newspaper in New York city and in the city of Cincinnati, or he may surrender said locomotives to any party in interest if they so desire, the net proceeds of any such sale to be a credit on the above amount:

101 Thereupon the court orders as follows:

It is now ordered that the purchasers of the Southeastern Division of the said Toledo, Cincinnati & St. Louis railroad, as being primarily chargeable therewith as between themselves and the said intervenor under the said decree of Dec. 22nd, 1883, be and they are required to pay or cause to be paid into the registry of this court within sixty days from the 28 day of January, 1889, for the use of the said intervenor, R. S. Grant, the amount of $29,083.96, with interest thereon from the 12th day of November, 1888.

And it is further ordered that in default of making of the said payment within the time so limited therefor the said Southeastern Division be resold upon request of the said intervenor herein, the said R. S. Grant, for the payment and satisfaction out of the proceeds thereof of the said sum of $29,083.96, with interest, herein directed to be paid to the said intervenor by the said purchasers.

And it is further ordered that this decree is without prejudice to any right the said intervenor may have to apply for orders to resell other mortgage divisions of the Toledo, Cincinnati and St. Louis railroad for the payment out of proceeds of such resale any balance of the amount hereinbefore named, to wit, said sum of $29,083.96, not realized upon any sale of the Southeastern Division.

And it is further ordered that in case any resale of the railroad and property hereinbefore described in this case becomes necessary by reason of default in the payment of said amount hereby ordered to be paid, then such resale shall be made pursuant to the terms of the original decrees for the foreclosure and sale of the said railroads respectively, but by the marshal of this district, who is hereby appointed master commissioner for that purpose, and that leave

102 is given to apply to this court for further directions as to any such sale.

And it is further ordered that this order is and shall be without prejudice to the right of the said Southeastern Division and the purchasers thereof or any other persons or corporation to apply to this and other courts having jurisdiction in the several cases in foreclosure proceedings against the several divisions of the said Toledo, Cincinnati & St. Louis railroad for contribution towards the said amount from said several divisions or the said purchases thereof, or in the event of the payment of the same by said purchasers of said Southeastern Division to apply for a distribution thereof over and among said other divisions according to the

percentage of contribution and distribution applicable thereto as herein and in said other causes of foreclosure has been or may be determined, or to collect or enforce the payment of said sum by the said Toledo, Cincinnati & St. Louis Railroad Company or out of and against any property thereof, all as the rights not now passed upon but expressly reserved as to such contribution of the said parties purchasers of said respective mortgage divisions and said Toledo, Cincinnati and St. Louis Railroad Company, as between each other, shall appear and as this court and any other court having jurisdiction in or touching the premises heretofore may have determined or shall order, adjudge, and decree.

And thereupon the said Central Trust Company of New York prays an appeal to the Supreme Court of the United States from the orders and decrees so made, and the said Central Trust Company also prays an appeal to the Supreme Court of the United States from the said rulings hereinbefore mentioned, to which it excepted
103 as aforesaid, which exceptions are allowed, and this court allows both of the appeals so prayed upon the said appellants filing a bond herein, with sufficient security, to be approved by this court, in the sum of eight thousand dollars, which appeal shall, during the pendency and until the determination thereof, supersede this decree and all enforcements thereof by or on behalf of the said intervenor.

And in like manner from the rulings hereinbefore set forth to which the Dayton, Fort Wayne and Chicago Railroad Company excepted as aforesaid, which exceptions are also allowed, the Dayton, Fort Wayne and Chicago Railroad Company also prays a like appeal from the orders and decrees so made, except from so much thereof as provides that the same is without prejudice to any contribution by any of the purchasers under the provisions of the said order or realized under any resale made under this order, and this court allows the same, the said appellants filing herein a bond for costs in the sum of five hundred dollars, with sufficient security, to be approved by this court.

THE UNITED STATES OF AMERICA,
Southern Dist. of Ohio, Western Division, } *ss:*

I, Benjamin R. Cowen, clerk of the circuit court of the United States within and for the division and district aforesaid, do hereby certify that the foregoing entry is truly taken and correctly copied from the journal of said court.

Seal of the Circuit Court, South'n Dist. of Ohio.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at the city of Cincinnati, O., this 11th day of September, A. D. 1889.

B. R. COWEN, *Clerk*,
By R. C. GEORGI, *Dep.*

104 [Endorsed:] Exhibit No. 6 A to bill of review. Case 4217. Copy. No. 3554. U. S. circuit court, southern district of Ohio, western division. Central Trust Co. of New York *vs.* Toledo, Cincinnati & St. Louis R. R. Co. *et al.* Order for resale of Southeastern Division upon decree in favor of the intervenor, R. S. Grant. Entered Jan'y 28, '89, Journal Y, 182.

Endorsed on cover: S. Ohio C. C. U. S. No. 1282. The Central Trust Company of New York, appellant, *vs.* R. S. Grant. Filed October 2, 1889.

same court, have been sufficiently stated in the brief submitted by us in numbers 1,277 to 1,280, on the motions to dismiss or affirm. We desire, however, to correct certain statements made by appellees' counsel in their printed brief submitted herein. Appellees (page 5 of brief) say that the orders of December 22, 1883, were set aside by the court *of its own motion*. While those orders do so state, yet they also state that the cause came on to be heard upon the intervening petitions of R. S. Grant and The Grant Locomotive Works. It is also to be remembered these orders were not set aside until after notice to R. S. Grant and the Grant Locomotive Works, nor until after they had been fully heard. The offer of appellees to file answers and affidavits was immaterial, because the intervening petitions were taken as true in granting the relief embraced in the order of April 10.

Appellees further claim that the order of June 11, 1887, entered in cases 3,554 and 3,578, declaring the order of April 10, 1884, void, had the effect of annulling all proceedings taken in pursuance thereof, and that the appearance by Grant and the Grant Locomotive Works before the master, in the prosecution of their claims for compensation for use and deterioration of their locomotives, can have no effect upon their present contention. To this we answer that the order appointing the master before whom these intervenors appeared was an order of April 5, and not April 10. No attempt has ever been made to rescind that order. But if the order of April 10, 1884, which directed that R. S. Grant and The Grant Locomotive Works appear and make proof before the master appointed under the prior order, as to the amount of compensation due them for use and deterioration of locomotives, be a nullity, as claimed, then R. S. Grant and The Grant Locomo-

tive Works are in the position of having voluntarily appeared there and submitted their proofs.

Appellees further speak (see brief, p. 6) of the sale of the "south-eastern division," under foreclosure in the suit of The Central Trust Company; and of the sale of the "Cincinnati Northern division," under foreclosure suit brought by the same complainant. We desire to call attention to the fact that this should be treated as mere convenience of speech. So far as the rights of the mortgagees are concerned, there is no such thing as the "south-eastern division" nor the "Cincinnati Northern division." These mortgages were not made by the same mortgagor upon different sections or parts of the same railroad; but each mortgage, as has repeatedly been said, is made by a different mortgagor to secure different sets of bonds, and on different property, and the law of Ohio is very careful to preserve intact the rights of lien-holders against impairment by railroad consolidation.

ARGUMENT.

1. The first ground alleged for the motion to dismiss the appeals in these cases is that The Central Trust Company did not have sufficient interest to maintain a bill of review. That subject has been already sufficiently discussed in our brief in the other cases.

2. The next ground suggested is that the bills of review were not filed in the court below until after the record in 3,554 and 3,578 had been removed into this court, and consequently not until after the Circuit Court had lost all jurisdiction and right to grant the prayer of such bills. This claim necessarily assumes that the record in 3,554 and the record in 3,578 were removed from the Circuit Court

at a time of day on January 28, 1889, prior to the time when the bills of review were filed that day. Appellees claim that it must be assumed that the decrees in 3,554 and 3,578, at the foot of which an appeal was allowed, were entered at an earlier moment on the 28th of January, 1889, than the time at which the bills of review were filed. There is no foundation in fact for this presumption, as we will show later.

The claim of the appellees that the jurisdiction of the Circuit Court was ousted from the moment of the entering of the decrees of January 28, 1889, with an allowance of an appeal appended thereto, is claimed upon the doctrine of relation; but we think that doctrine can not be invoked in order to cut off these bills of review. Relation is a fiction of law resorted to for the purpose of accomplishing justice, and not in order to defeat a remedy.

Lynch v. *Bernal*, 9 Wall. 315. (See p. 325.)
Gibson v. *Chouteau*, 13 id. 92. (See p. 101.)

Moreover, the appeals allowed in 3,578 and 3,554 were to take effect only upon the appellants' filing a bond with sufficient surety to be approved by the court, in the sum of $5,000, which appeal during the pendency thereof should supersede the decree (p. 91, Record, 1,277). The giving of the bond and its approval was part of the allowance of the appeal. The allowance of the appeal would not take effect until such bond was given and approved. The bond was not given and approved until several days thereafter, viz., January 31, 1889. There is no difference between an appeal taken in open court during the term at which the decree is passed, and one taken out of court before a judge, except that in the latter case a citation is necessary to the adverse party.

Hudgins v. *Kemp*, 18 How. 537.

In *Draper* v. *Davis*, 102 U. S. 370, this court said: "When the original bond was accepted by the justice and the citation signed, an appeal was allowed and security taken, which operated as a *supersedeas*. *That transferred the jurisdiction of the suit appealed to this court*. . . . *From that* time the control of the *supersedeas*, as well as the appeal, was transferred to this court." And, again, in *Keyser* v. *Farr*, 105 U. S. 265: "After the acceptance of the bonds for an appeal, and the docketing of the cause in this court, the jurisdiction of the court below was gone. *From that time* the suit was cognizable only in this court. In *Goddard* v. *Ordway*, 101 U. S. 745, there was nothing more than the formal order of allowance entered, as in this case, with the final decree. Such an order, while in that condition, it was held, was subject to the control which every court retains over its ordinary judgments during the term."

In *Ensminger* v. *Powers*, 108 U. S. 302, this court used this language: "But the appeal to this court *was perfected* by the giving of a bond for costs in January, 1874, and, although this court in December, 1875, dismissed the appeal for failure of the appellants to file and docket the cause in this court, yet the cause was out of the court below and in this court until within two years before the bill in this case was filed."

In *Goddard* v. *Ordway*, *supra*, it was decided by this court that the allowance of an appeal in open court entered upon the record may be set aside by that court at any time during the term. Such could not be, if the entry of the allowance of the appeal, *ipso facto*, ousted the court below of jurisdiction in the case.

So, in this case, the term of the Circuit Court of the United States at which the decrees, with allowance of ap-

peals, were entered, did not end until the first Tuesday of February, 1889. Surely, during all of that time, the court could have set aside the decrees appealed from, and with them the allowance of the appeals.

The record shows that the final decrees, with allowance of appeal, conditional as we claim, were entered January 28, 1889. The appeal bonds to operate as *supersedeas* were approved January 31, 1889. In the meantime, the bills of review had been passed upon by the court, and had been dismissed, or what is the same thing, stricken from the files. This occurred on January 29, 1889. (Record, 1,282, p. 14.)

It thus appears that the appeals allowed from the decrees of January 28, 1889, were not *perfected* by giving the approved security until *after* the court had refused to grant relief by the bills of review. That relief would have made unnecessary the prosecution of the appeals. But when it was denied, that course was the only step left to obtain justice.

But, as a matter of fact, our bills of review were filed before the appeals of January 28, 1889, were either entered or handed by the court to the clerk for entry. This is shown by the affidavit of the clerk of the Circuit Court, which we have filed in these cases. This is corroborated by the order of occurrences as stated in the decrees themselves. Those decrees show that the first step taken by The Central Trust Company on the day on which the matter came before it for hearing, was to apply to have the petition, called "petition for rehearing, etc.," filed in the cases March 15, 1884, then heard. This being refused, it is shown that the next step was to apply to the court for leave to have a bill of review, which was then ready for filing, allowed to be docketed as of the date

of March 15, 1884. This being refused, thereby terminating all discussion as to the steps to *further* expunge the orders of December 22, 1883, the merits of the question were taken up. But, before doing so, the bills of review were filed as independent suits, which we had to do without leave of court.

AS TO THE MOTIONS TO AFFIRM.

It is claimed that the decrees below, striking the bills of review from the files, should be affirmed because the bills of review were not filed within two years after the decrees of December 22, 1883, were entered.

We claim the bills of review sufficiently excuse the delay. There is no statute requiring a bill of review to be filed within the same time limited for writs of error. The general rule requiring a bill of review to be filed within two years is not inexorable. The object of the rule is to guard against laches and neglect. This court said in *Thomas* v. *Harvie*, 10 Wheat. 149, "that bills of review are not strictly within any act of limitation prescribed by Congress; but it is unquestionable that courts of equity, acting upon the principle that laches or neglect ought to be discountenanced, and that in case of state demands its aid ought not to be afforded, have always interposed some limitation to suits brought in those courts."

The time limited for filing a bill of review by the English chancery practice was twenty years.

2 Dan. Chan. Pr. 1580.

The present bills of review set forth the following reasons why a bill of review could not have been filed within two years.

"Your orator says it was impossible for it to file a bill of review to correct said orders at any time between March 15, 1884, and June 11, 1887, because said orders had by said order of April 10, 1884, been set aside and annulled, and your orator was compelled to so regard them and did so regard them during said period, and was during said period thereby debarred from taking any steps to correct said orders.

And, moreover, your orator says that during said period from March 15, 1884, to June 11, 1887, it believed and had the right to believe that said R. S. Grant and said Grant Locomotive Works had abandoned all claim of right under said orders of December 22, 1883; and so your orator says that said period of time between March 15, 1884, and June 11, 1887, ought not be counted against it in filing its bill of review."

(Record, 1282, page 9.)

In *Ensminger* v. *Powers*, 108 U. S. 302, a bill in equity had been filed in 1867 by Bridget Powers and the city of Memphis to enjoin the assertion by defendants, Ensminger and Sears, of title acquired by tax sale to the lot of land described in the bill. The case below resulted in a decree dismissing the bill, December 27, 1873. The City of Memphis and Bridget Powers appealed to this court, January, 1874. The cause, on the 13th of December, 1875, came on for hearing and was dismissed for want of compliance with certain rules of court, and was remanded to the Circuit Court for execution and further proceedings.

On September 9, 1876, nearly three years after the decree was entered, Bridget Powers filed a bill of review to reverse the decree of December 27, 1873, previously appealed from. The objection that said bill of review was not filed within two years was disposed of by this court as follows:

"It was not filed within two years after the decree of December, 1873, was rendered. But the plaintiffs in that decree appealed from it to this court, it being a final decree. A bill of review must *ordinarily* be brought within the

time limited by statute for taking an appeal from the decree sought to be reviewed, where, as here, the review sought is not founded on matters discovered since the decree. But the appeal to this court was perfected by the giving of a bond for costs in January, 1874, and although this court, in December, 1875, dismissed the appeal for the failure of appellants to file and docket the cause in this court, yet the cause was out of the court below and in this court until within two years before the bill in this court was filed. The pendency of the appeal by Bridget Powers would have been a valid objection to the filing of a bill of review by her for the errors in law now alleged, and, inasmuch as the appeal was not heard here on its merits, but the prosecution of it was abandoned, we are of opinion that the bill of review was filed in time. While the appeal was pending here, although there was no *supersedeas*, the circuit court had no jurisdiction to vacate the decree, in pursuance of the prayer of a bill of review, because such relief was beyond its control. The time during which that control was suspended to await the orderly conduct of business in this court in regard to hearing the appeal, is not to be reckoned against Bridget Powers in this case, although she joined in the appeal."

It would have been absurd for The Central Trust Company to have filed a bill of review to reverse these decrees after they had been set aside. The Central Trust Company had a right to rely upon the correctness of the decision of the judge who set the orders aside, particularly in view of the fact that the intervening petitioners took no steps to prosecute an appeal from that order, although they prayed an appeal which was disallowed. But the disallowance of such appeal was no excuse for the failure to prosecute the same, as they could have obtained a

mandamus to compel the allowance of the appeal, had the decrees been appealable.

If The Central Trust Company had filed a formal bill of review to reverse the orders in question after they had been previously set aside under proceedings already taken, such bill must have been stricken from the files. On appeal to this court from that order, the present appellees would have been placed in the attitude of being obliged to consent to a reversal by this court, or abandon the claim that the orders of December, 1883, were final.

In *Buckner* v. *Forker*, 7 Dana, 51, the Court of Appeals of Kentucky said that as a bill of review had not been filed until nine years after the decree was rendered, and that as no *sufficient ground* was shown for not having filed a bill of review for its reversal within the time limited for the prosecution of writs of error, the bill of review ought not to be sustained as to errors of law upon the record.

The cases all recognize that there may be sufficient ground for not filing a bill of review within the period limited for writs of error. No general rule, however, seems to be laid down as to what will constitute such ground. The answer ought to be found by recourse to the reason for the adoption of the rule of limitation, and by applying the principle *ratione cessante cessat et ipsa lex.* The reason for limitation being to discourage laches and neglect, it ought not to be applied where they do not exist. In the present instance, the Circuit Court had set aside the decrees of December 22, 1883, upon what our adversaries delight to claim was merely a "petition for rehearing." That decision, and all that it implied with reference to the finality of those decrees, was acquiesced

in by the present appellees, because they failed to prosecute their appeal to this court.

If Bridget Powers (*Ensminger* v. *Powers*, *supra*) was entitled to have the time not counted against her, which she had consumed in her appeal to the Supreme Court, it seems, on clearer grounds, that time during which, by the court's decision, resort to a bill of review is rendered not only unnecessary, but practically impossible, should not be counted. Not until the order of June 11, 1887, setting aside the order of April 10, 1884, was it considered by the court that a bill of review was necessary. Upon so holding, the court should have allowed a bill of review to be filed in accordance with the prayer of the petition of March 15, 1884, that it be taken as a petition for leave to file bill of review, if such bill was, in the judgment of the court, necessary. As before stated, the court practically decided, by the order of April 10, 1884, that a bill of review was not required. Should we presume to know better than the court, and have filed a bill of review notwithstanding?

In *Edmondson* v. *Moseby's Heirs*, 4 J. J. Mar. 502, the court said: "There does seem to be obvious propriety, as a general rule, to apply for leave to file any bill to reverse, alter, or explain a decree. And the cases in which it was done without the consent of the court previously given ought to be considered as exceptions to the general rule. But should a party choose to waive the right which he has, under the exception, and apply to the court, it may be a serious injury to him to have his application rejected if his case merits relief. What would be his remedy in such a case? Should he file his bill in the clerk's office and demand process upon it? Might not the clerk be considered as acting in contempt of the authority of the court,

to comply with his request, in violation of the opinion of the court entered upon the records?"

"The opinion of the court entered upon the records" in this case (*vide* order of April 10, 1884) was that the orders of December 22, 1883, were not final orders, and, therefore, a bill of review was not needed to give the court jurisdiction to set them aside. The record so stood until June 11, 1887, when other judges decided that the decrees of December 22, 1883, were final decrees, and could have been reversed in the same court only by a bill of review. We submit that during the period from April 10, 1883, until June 11, 1887, it would have been a "violation of the opinion of the court" entered upon its record for us to have filed a bill of review to set aside an order which the court had already rescinded. When the court made the order of June 11, 1887, it left our application for a bill of review still pending and unacted upon, and it is pending to this date in that case. It seems to us that justice requires either that the present bill of review, by reason of the pending application, be considered as dating from March 15, 1884, or else that the time intervening between April 10, 1884, and June 11, 1887, should not be counted against us.

Respectfully submitted.

EDWARD COLSTON,
GEORGE HOADLY, JR.,
Attorneys for Appellants.

CINCINNATI, *March*, 1890.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

CENTRAL TRUST COMPANY,
Appellant,
vs.
GRANT LOCOMOTIVE WORKS AND THE AMERICAN LOAN AND TRUST CO.

No. 1281.

CENTRAL TRUST COMPANY,
Appellant,
vs.
R. S. GRANT.

No. 1282.

ON APPEAL FROM CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

BRIEF ON BEHALF OF THE APPELLEES IN SUPPORT OF MOTIONS TO DISMISS, UNITED WITH MOTIONS TO AFFIRM TOGETHER WITH FORM OF MOTIONS.

B. H. BRISTOW,
BLUFORD WILSON,
WM. S. OPDYKE,
Solicitors and Counsel for Appellees.

C. G. Burgoyne's Printing Business, Cor. Walker and Centre Sts., N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1889.

THE CENTRAL TRUST COMPANY OF NEW YORK, Appellant, vs. THE GRANT LOCOMOTIVE WORKS and THE AMERICAN LOAN AND TRUST COMPANY.	No. 1281.
THE CENTRAL TRUST COMPANY OF NEW YORK, Appellant, vs. R. S. GRANT.	No. 1282.

Motions to Dismiss and Affirm.

On this fifth Monday of March, 1890, being the 31st day of March, 1890, in the October Term of the year 1889, come the appellees, the Grant Locomotive Works, The American Loan and Trust Company and R. S. Grant, and severally move this court that the appeals of the Central Trust Company, appellant in these causes respectively, be dismissed for the reason that the appellant has not shown upon the records herein and has not any right to appeal from the decrees in the Circuit Court of the United States for the Southern District of Ohio, from which the said appeals purport to

have been taken, and upon the ground that this court has no jurisdiction to entertain either of said appeals.

The appellees, the Grant Locomotive Works, the American Loan & Trust Company and R. S. Grant, also at the same time move this court to affirm the several decrees of the Circuit Court of the United States for the Southern District of Ohio, appealed from by the appellants herein, upon the ground that even if this court has jurisdiction to entertain the said appeals, it is nevertheless manifest that the said appeals were taken for delay only, and that the question upon which the jurisdiction of this court depends are so frivolous as not to require further argument.

The said appellees, pursuant to the provisions of said Rule 6, file herewith their printed brief in support of their said motions, and also an affidavit of the deposit in the mail at the post-office, in the City of New York, of notices of these motions and of the brief in support thereof, addressed to Edward Colston, Esq., counsel for the appellants of record in this court, at Cincinnati, Ohio, the proper address of the said counsel, at such a time as to reach him by due course of mail three weeks before the fifth Monday of March, 1890, the time fixed for submitting the said motions.

B. H. Bristow,
Wm. S. Opdyke,
Of Counsel for the Appellants.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1889.

THE CENTRAL TRUST COMPANY OF NEW YORK, Appellant, vs. THE GRANT LOCOMOTIVE WORKS and THE AMERICAN LOAN AND TRUST COMPANY.	No. 1281.
THE CENTRAL TRUST COMPANY OF NEW YORK, Appellant, vs. R. S. GRANT.	No. 1282.

Brief in support of motions to dismiss the appeals herein, united with motions to affirm the decrees appealed from under Rule 6, on behalf of the appellees, the Grant Locomotive Works, the American Loan and Trust Company and R. S. Grant.

STATEMENT.

The appeals in these cases were from decrees of the Circuit Court of the United States for the Southern District of Ohio, entered January 29, 1889. These decrees struck from the files of the Court papers purporting to be original bills of review filed by the complainant, as trustee for mortgage bondholders, to review certain decrees of the said Court in favor of the appellees, for amounts severally in excess of $5,000, which had been entered on December 22, 1883, in suits brought by the said Central Trust Company for the foreclosure of

certain railway mortgages given to the Trust Company as trustee for for the said bondholders.

The motions to dismiss are made upon the ground that the appellant has not any right to appeal from the decrees of the Court below in either of the said causes and that this Court has no jurisdiction to entertain the appeals in either of the said causes. The motions to affirm are made upon the ground that even if this Court has jurisdiction to entertain the said appeals, it is nevertheless manifest that the said appeals were taken for delay only and that the question upon which the jurisdiction of this Court depends is so frivolous as not to require further argument.

Notices of these motions have been served upon the appellant, together with this brief within the time required by Rule 6. The full record as filed in this Court has been printed in each of the said causes.

FACTS.

The bills of complaint in these causes were filed on January 28, 1889 (Rec., 1281–1282, marg. p. 1). They allege that certain decrees made December 22, 1883, in two foreclosure suits in which the appellant the Central Trust Company was complainant, in favor of the appellees as intervening petitioners claiming property in the possession of the Receiver in such suits, were erroneous and should be reviewed, reversed and set aside by reason of divers errors and imperfections in such decrees (Rec., 1281, marg. p. 21–26; Rec., 1282, m. p. 9–25).

Two of the said decrees of December 22, 1883, had been entered in the foreclosure suit of the Central Trust Company against the Toledo, Cincinnati and St. Louis Railroad Company, the Toledo, Delphos and Burlington Railroad Company and another, to foreclose a mortgage made by the second-named company upon a portion of the railroad of the first-named company before the consolidation of the two companies, which division is spoken of in the litigation as the Southeastern Division (Rec., 1281, m. p. 36–54). The other two of the said decrees of December 22, 1883 had been entered in the foreclosure suit brought by the Central Trust Company against the said Toledo, Cincinnati and St. Louis Railroad Company and the Cincinnati Northern Railway Company, to foreclose a mortgage made by the second named company upon a division of the railroad of the first named company

before the consolidation of the two companies, which division is spoken of in the litigation as the Cincinnati Northern Division (Rec. 1281, m. p. 35–52).

The said decrees of December 22, 1883 were made upon intervening petitions filed respectively in October, 1883, by the appellees the Grant Locomotive Works and the American Loan and Trust Company, and the appellee R. S. Grant, praying a surrender of certain locomotives in the possession of the Receiver appointed in said two foreclosure suits; and alleging that the said locomotives were the subject of contracts of conditional sales from the petitioners to the railway companies aforesaid respectively, under which contracts the title to the locomotives remained in the petitioners, and further alleging that by reason of default in making payments for the said locomotives the petitioners had a right to immediate payment of the whole purchase money or to a return of the locomotives. (Rec. 1281, 82, m. p. 6–8).

The said decrees of December, 1883, appear in full at marg. pp. 9 to 15 of the Record in No. 1281, and at marg. pp. 8–14 of the Record in No. 1282.

These decrees of December 22, 1883, were made in the October (1883) Term of the said Court. The February Term, 1884, of the said Court followed and continued not later than April 1, 1884. Pending the February Term the appellant, the Central Trust Company, filed in the said foreclosure suits its so-called petitions for rehearing, etc. (Rec. 1281, m. p. 68; Rec. 1282, m. p. 66). These petitions neither prayed for process, nor was any process issued thereon, or any subsequent hearing had thereon.

After the expiration of the February Term, and during the succeeding April Term, 1884, the Hon. JOHN BAXTER, Circuit Judge of the Sixth Circuit, sitting in the said Circuit Court, directed the entry of orders in the said foreclosure suits vacating the said decrees of December 22, 1883. The said orders appear to have been made by the Court *of its own motion*, and not upon the said petitions for rehearing or otherwise. The Court refused leave to the intervening petitioners to produce evidence or to appeal from the orders so entered. These orders will be found at marg. pp. 79 to 82 of the Record of No. 1281, and at marg. pp. 80 to 82 of the Record of No. 1282.

Subsequently upon application of the said intervening petitioners, appellees herein, the said Circuit Court, by order entered June 11, 1887, set aside the said orders made by Judge Baxter on April 10,

1884, adjudging the same null and void, and restoring the said decrees of December 22, 1883 (Rec., 1281, m. p. 19; Rec., 1282, m. p. 17). No appeals have been prosecuted from these orders.

The appellant claims that certain references to a Master, as to the appellees claims, were made and prosecuted under Judge BAXTER'S orders of April 10, 1884, and that the appellees offered proof, &c., thereunder [Rec., 1281, m. p. 18; Rec., 1282, m. p. 16]. But the decrees made by Mr. Justice MATTHEWS and Mr. Justice JACKSON on June 11, 1887, declaring the orders of April, 1884, to be void *ab initio*, had the effect of annulling all proceedings taken in pursuance thereof. No action taken by the appellees, while protesting against Judge BAXTER'S orders and with full reservation of all their rights, could prejudice their position.

Subsequently on January 28, 1889, the said Circuit Court entered decrees in the foreclosure suits to enforce the said decrees of December 22, 1883, requiring the purchasers to pay to the appellees the amounts due them under the said decrees, and ordering that in default thereof the property bought by the said purchaser should be resold to realize the said amounts. These decrees appear at marg. pp. 84 to 85 to 102 of the Record of No. 1281, and at marg. pp. 84, 85 to 103 of the Record of No. 1282.

The said Southeastern Division was sold under foreclosure in the suit aforesaid brought by the said Central Trust Company, in June, 1884 (Rec. 1281, m. p. 18). The Cincinnati Northern Division was sold under foreclosure in the suit aforesaid brought by the said Central Trust Company, in July, 1885 (Rec. 1282, m. p. 16). Under each of the said sales the purchasers of the Divisions so sold took the mortgaged property subject to the enforcement of any prior liens adjudged by the Court to be due thereon (Rec., 1281, m. pp. 88, 98; Rec., 1282, m. pp. 89, 99).

Pending the hearing of the motions upon which the said decrees of January 28, 1889, were made, the appellant, The Central Trust Company, asked the Court that its so-called petitions for rehearing, &c., filed in the said foreclosure suits March 15, 1884, be then heard as petitions for the rehearing of the said decrees of December 22, 1883, or if that relief were denied, that the same be taken and held to be bills of review or bills in the nature of bills of review; or, if that relief were denied, that the said petitions be amended and supplemented in certain respects, as stated in papers then read, and be then docketed as original bills of review, as of March 15, 1884; which applications were, and every part thereof was, denied in all

respects, to which the said appellant excepted (Rec. 1281, m. pp. 85, 95; Rec. 1282, m. pp. 87, 96.) From these decrees of January, 1889, the Trust Company was allowed appeals (Rec. 1281, m. pp. 92, 102; Rec. 1282, m. pp. 93, 103). These appeals are now Nos. 1277 to 1280 on the docket in this court.

Notwithstanding that the Court refused leave to the Central Trust Company, appellant herein, to file the proposed amended and supplemented bill, as above stated, the appellant on the same day did file the bills in these causes, which bills had been verified on January 10, 1889, (Rec. 1281, m. p. 27; Rec. 1282 m. p. 26).

On the succeeding day, January 29, 1889, the Circuit Court on motions made on behalf of the appellees, struck the said bills of review from the files of the Court; from which order the appellant prayed and was allowed the appeals herein (Rec. 1281, m. p. 30; Rec. 1282, m. p. 29).

Fuller statements of the essential facts of the whole litigation will be found in the briefs on behalf of these appellees in the said causes Nos. 1277 to 1280 in this Court, motions to dismiss the appeals in which are submitted together with these motions, and the Court is respectfully referred to the statements of fact in the said briefs as supplementing the statement here made.

ARGUMENT.

As to the Motions to Dismiss.

The appeals of the Central Trust Company, appellant in these causes, should be dismissed.

I. It does not appear that the Central Trust Company as trustee, or the bondholders whom it represents, have any interest in the subject matter of the litigation.

The questions involved are merely whether the decrees of December 22, 1883, in the foreclosure suits against the Toledo, Cincinnati and St. Louis Railroad Company should or should not now be treated as valid, and should or should not now be enforced against the purchasers of the mortgaged property under the foreclosure decrees in the said foreclosure suits.

The said foreclosure sales were made in the years of 1884 and 1885 respectively. At the time when the bills in these causes were filed in the Circuit Court below, there had already elapsed four or more years after the making of the said foreclosure sales. The pro-

visions of the said decrees of sale do not appear in the record in these causes. It does appear, however, from the decrees of January 28, 1889, contained in the records, that the purchasers of the mortgaged property foreclosed were ordered to pay the claims of the appellees upon the theory that the Court had retained a lien for such claims against the property sold (No. 1281, pp. 88, 98; No. 1282, pp. 89, 99).

It appears, therefore, that the foreclosure decrees probably provided, in the usual form, that the purchasers should be bound to pay all claims ascertained to be prior to the mortgage liens. It is also to be presumed that all the proceeds of the foreclosure sales which were to enure to the benefit of the bondholders, have long since been distributed among them. At any rate, it does not affirmatively appear from the record that the bondholders have now any claim or right to further payments from the proceeds of the mortgaged property. Therefore, upon the record, neither the Central Trust Company nor the bondholders whom it represents, have now any such interest in the subject matter as will support the appeals in these cases.

The motions seem, therefore, to be fully supported by the decision of this Court in the case of *The Farmers' Loan and Trust Company vs. Waterman, 106 U. S., 265.*

II. Again, the Circuit Court below was without jurisdiction to entertain the bills of review which the appellant attempted to file in that Court on January 28, 1889.

These bills sought to review, for error upon the record only, certain decrees made by that Circuit Court more than five years previously. The decrees sought thus to be reviewed were decrees made in favor of the appellees here, as intervening petitioners in the said foreclosure suits, upon claims against the mortgaged property. They were, therefore, *final* decrees under well settled rules, and as such appealable to this Court. This being the case the Circuit Court had no power to review these decrees after the expiration of two years from December, 1883.

If the appellant had any right to complain of these decrees it could either

(1) Have petitioned the Circuit Court for a rehearing during the October Term of the year 1883 (Equity Rule 88), or

(2) Have appealed to this Court from the said decrees at any time within two years, or

(3) If it desired to attack the decrees for new matter or newly discovered evidence, it could, after leave of Court first obtained, have filed bills of review upon such new facts or newly discovered evidence, within any reasonable time while the causes remained in the Court below, and not thereafter (Mitf. vs. Tyler's Equity Pr., 487).

The appellant, however, availed itself of neither of said three courses. And, therefore, the said decrees of December 22, 1883, were in January, 1889, beyond the power of the Circuit Court to alter, amend or review in any form.

Barrell vs. Tilton, 119 U. S., 637.
Ensminger vs. Powers, 108 U. S., 292, 302.
Bronson vs. Schulten, 104 U. S., 410.
Buffington vs. Harvey, 95 U. S., 99.
McMicken vs. Perin, 18 How., 507.
Cameron vs. McRoberts, 3 Wheat., 591.

III. It also appears that the Circuit Court below was, at the time the appellant attempted to file its bills herein, without jurisdiction to review the decrees of December, 1883, for the reason that these decrees were made in causes which had been removed by the appellant into this Court.

Pending the hearing upon the aforesaid decrees of January 28, 1889, the Central Trust Company, the appellant herein, prayed leave to amend its former so-called petitions for rehearing and to supplement the same, so as to make the same bills of review to be treated as if filed in March, 1884. Papers were presented to the Court representing the proposed amendments (Rec., 1281, pp. 85–86 and 95–96; Rec., 1282, pp. 86–88 and 98). These prayers of the Central Trust Company, appellant, having been denied, it excepted to the same, and thereupon prayed appeals from the whole of the said decrees to this Court, which appeals were allowed. These appeals were duly perfected and are now before this Court as causes Nos. 1277 to 1280, motions to dismiss the appeals in which causes are submitted together with these motions.

It is submitted that the original foreclosure suits below were thus removed to this Court, as of January 28, 1889, and that no bills of review of any decree in the course of those suits could then be entertained by the Circuit Court below.

The bills in these causes were verified on January 10, 1889, and were evidently the papers presented to the Circuit Court below on

January 28, 1889, when the decrees made on that day were entered. It is evident, therefore, that the bills in these causes were not filed until after the entries of the decrees of January 28, 1889, on which appeals were allowed to the Central Trust Company, and those causes removed to this Court.

The Circuit Court below being, therefore, without jurisdiction to entertain these bills, the appeals here cannot be entertained, but must be dismissed.

As to the Motions to Affirm.

Even if this Court should see fit not to sustain the motion to dismiss the appeals herein, nevertheless the decrees should be affirmed under the provisions of Rule 6, since the questions upon which the jurisdiction of this Court depends are purely frivolous, and the appeals have evidently been taken merely for purposes of delay.

I. The Court below being without jurisdiction to entertain these bills, both for the reason that more than two years had elapsed since the entry of the decrees sought to be reviewed and for the reason that the causes in which such decrees had been made had been removed to this Court, it was plainly the duty of the Court below to strike these bills from its file.

II. The bills in these causes clearly purport to be original bills for the review of former decrees, upon the record merely and not upon the ground of any new matter or newly discovered evidence. Even if the bills rested upon new matter or newly discovered evidence, nevertheless they could not be filed without leave of the Court first had and obtained, and that leave not only had not been obtained, but had been substantially refused.

The appellant's bills being based upon error upon the record merely, the Circuit Court had no jurisdiction to entertain the same after two years had passed since the entry thereof in December, 1883.

Ensminger vs. Powers, 108 U. S., 292.
Clark vs. Killian, 103 U. S., 766.
Kennedy vs. Georgia State Bk., 8 How., 586.
Whiton vs. Bank of U. S., 13 Pet., 6.
Thomas vs. Harvie's Heirs, 10 Wheat., 146.

III. For the reasons more fully stated in the brief filed on behalf of the appellees herein in causes 1277 to 1280, on motions submitted with these motions, it is clear that the decrees of December 22, 1883, sought to be impeached by the bills attempted to be filed in these causes, are not only now unimpeachable from lapse of time, but were in all respects correct and binding decrees.

IV. In another aspect, the decrees of December 22, 1883, appear, upon the face of the bills attempted to be filed in these causes, to be nothing more than evidences of the contract which the Court below, being in the possession of the mortgaged property through its Receiver, had full power to authorize its Receiver to make for the purchase of property imperatively needed in the administration of the railroads in his hands. In authorizing the making such contracts the Court was fully advised through its officer, the Receiver, and was under no obligation to notify or consult the mortgage trustee or the other parties interested in the propr-ty. The obligations of the contract of purchase thus entered into by the Receiver under authority of the Court, created a Receiver's debt, which under well-established rules became a lien upon the mortgaged property prior to the mortgage liens. The rights, therefore, of the appellees to require payment of the purchase money of their locomotives from the mortgaged property, do not necessarily rest upon these decrees as decrees merely, but are contract rights which cannot be impeached or impaired on the demand of the appellant or of any one else, without the consent of the appellees.

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